70

EXHIBIT 4.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.,
PURCHASING AND SUPPLY DEPARTMENT,
90 WEST STREET, *Aug.* 21, 1909.

Mr. C. J. Newcomer, East Buffalo, N. Y.

DEAR SIR:

Refer to "File HFL."

We have contracted with the Vassar Hay & Products Company for three-thousand (3,000) tons of Hay for delivery Sept. 1909 to May 1910.

I have instructed these people to consign the shipments of Hay to the D. L. & W. Railroad care of G. F. Wilson, Buffalo, N. Y., and to send notice of shipment to you.

As these cars come in, please reconsign them to R. A. Phillips, Scranton, Pa., Co.'s use.

Yours truly,
(Signed) G. F. WILSON,
L.

HFL/N.

Copy to
G. E. HUSTIS,
B. YOUNG,
R. A. PHILLIPS,
C. M. SMITH.

(Here follows waybill marked page 71.)

Form P. & S. H. 9-09.

72

Exhibit 6.

The Delaware, Lackawanna & Western Railroad Co.

9-11, 1909.

Mr. C. M. Smith, *Tie and Timber Agent*:

Below please find amount of 2 1 Tim. Hay received this day from Vassar Hay and Produce Co. on B. & M. Car No. 62402. Same is insp. by H. Geiss for Bellevue Mines. Feet, Board Measure.

	Good.	Cull.	Rejected.
222 Bales	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

Notice.

When any part of shipment is culled or rejected, a value must be placed on such culled or rejected material by the head of the department to whom material is consigned, under the head of summary, Sep., 1909.

Summary.

		Amount.
Total—Good 25925# @ 15.40	.....	$199.62
Cull Less @ Freight	.....	11.07
Rejected @	.....	155.55
L. of P. A. 9-23 01	.....	17.80
		$173.35

Show freight charges, deduct same and attach copy of express bills.

H. GEISS,
Inspector.

This report must be made in triplicate.

73 The District Court of the United States for the Western District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.

Assignment of Errors.

The Delaware, Lackawanna and Western Railroad Company, defendant above named, in connection with its petition for Writ of Error, makes the following Assignment of Errors, which it avers occurred upon the trial of the cause, to wit:

First. The Court erred in denying the defendant's motion made at the close of the Government's case, to dismiss the Indictment and to direct a verdict of not guilty upon the ground that the facts proved did not constitute a violation of the statute upon which the Indictment was based, namely, the fifth paragraph of the first section of the "Act to Regulate Commerce", approved February 4, 1887, as said section was amended by an Act of Congress approved June 29th, 1906, which said paragraph is commonly known as the "Commodities Clause", or any statute of the United States, because it appeared as a matter of law that the bay mentioned in the Indictment was not owned by the defendant during the transportation thereof over its railroad between Black Rock and Scranton as set forth in the Indictment.

Second. The Court erred in denying defendant's motion made at the close of the Government's case, to dismiss the Indictment and to direct a verdict of not guilty upon the ground that the
74 facts proved did not constitute a violation of said statute known as the "Commodities Clause", or any statute of the United States, because it appeared conclusively as a matter of law and fact, that the bay mentioned in the Indictment during the transportation thereof by the defendant over its railroad between Black Rock and Scranton as set forth in the Indictment, was necessary and intended for the use of the defendant in the conduct of its business as a common carrier, and *was in fact* used by the defendant in the conduct of its business as a common carrier.

Third. The Court erred in denying defendant's motion made at the close of the Government's case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground that the facts proved did not constitute a violation of said statute known as the "Commodities Clause", or any statute of the United States, because the said statute, known as the "Commodities Clause", was not intended to prohibit and did not prohibit this Railroad Company from transporting over its railroad in interstate commerce to mines lawfully acquired, owned and operated by it, property lawfully purchased and acquired by it and owned by it during such transportation, and which was necessary and intended for its use and was used by it in the operation of such mines, and therefore did not prohibit the de-

fendant from transporting the hay mentioned in the Indictment from Black Rock to Scranton as set forth in the Indictment.

Fourth. The Court erred in denying defendant's motion made at the close of the Government's case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground that the facts proved did not constitute a violation of said statute known as the "Commodities Clause, or any statute of the United States, because said statute known as the Commodities Clause" was not intended to prohibit and did not prohibit this Railroad Company from transporting over its railroad in interstate commerce to mines lawfully acquired, owned and operated by it, property lawfully purchased and acquired by it and owned by it during such transportation and which was necessary and intended for its use and was used by it in the operation of such mines for the purpose of producing coal for the use of the railroad and for sale in the manner disclosed by the evidence in this case; and therefore did not prohibit the defendant from transporting the hay mentioned in the indictment from Black Rock to Scranton as set forth in the Indictment.

Fifth. The Court erred in denying the defendant's motion made at the close of the Government's case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground that said statute known as the "Commodities" Clause" in so far as it undertook to prohibit this Railroad Company from transporting over its railroad in interstate commerce, to mines lawfully acquired, owned and operated by it, property lawfully purchased and acquired by it and owned by it during such transportation, and which was necessary and intended for its use and was used by it in the operation of such mines for the purpose of producing coal to be sold by it at such mines, was unconstitutional and invalid because:

(a) It deprived such Railroad Company of its liberty and property without due process of law and took from it private property without just compensation, contrary to the Fifth Amendment to the Constitution of the United States.

(b) It imposed by section 10 of the statute of which it is a part, excessive fines in violation of the Eighth Amendment to the Constitution of the United States; and by reason of such excessive fines for each violation of said statute, naturally and necessarily operated, and must be construed as having been intended to operate to deter the railroad company from contesting the validity of the statute, thereby depriving such railroad company of liberty and property without due process of law, and denying it the equal protection of the laws.

(c) It was not a regulation of Interstate Commerce within the meaning and intent of the Commerce Clause of the Constitution of the United States, but was an absolute prohibition of the transportation of property in interstate commerce, which prohibition was not made for any purpose within any power in that behalf possessed by Congress under the Commerce Clause of the Constitution.

Sixth. The Court erred in denying defendant's motion made at the close of the Government's case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground that said statute

known as the "Commodities Clause" in so far as it undertook to prohibit this Railroad Company from transporting over its railroad in interstate commerce, to mines lawfully acquired, owned and operated by it, property lawfully purchased and acquired by it, and owned by it during such transportation, and which was necessary and intended for its use and was used by it in the operation of such mines for the purpose of producing coal for the use of the railroad and for sale in the manner disclosed by the evidence in this case, was unconstitutional and invalid for the reasons stated in the Fifth Assignment of Error above set forth.

Seventh. The Court erred in denying the defendant's motion made at the close of the whole case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground which is stated in the First Assignment of Error above set forth.

Eighth. The Court erred in denying the defendant's motion made at the close of the whole case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground which is stated in the Second Assignment of Error above set forth.

Ninth. The Court erred in denying the defendant's motion made at the close of the whole case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground which is stated in the Third Assignment of Error above set forth.

Tenth. The Court erred in denying the defendant's motion made at the close of the whole case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground which is stated in the Fourth Assignment of Error above set forth.

Eleventh. The Court erred in denying the defendant's motion made at the close of the whole case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground which is stated in the Fifth Assignment of Error above set forth.

Twelfth. The Court erred in denying the defendant's motion made at the close of the whole case, to dismiss the Indictment and to direct a verdict of not guilty, upon the ground which is stated in the Sixth Assignment of Error above set forth.

Thirteenth. The Court erred in denying defendant's motion for arrest of judgment upon the ground that the said statute, known as the "Commodities Clause", as applied to the facts in this case was unconstitutional because:

(a) It deprived the Railroad Company of its liberty and property without due process of law and took from it private property without just compensation, contrary to the Fifth Amendment to the Constitution of the United States.

(b) It imposed by section 10 of the statute of which it is a part, excessive fines in violation of the Eighth Amendment to the Constitution of the United States; and by reason of such excessive fines for each violation of said statute, naturally and necessarily operated, and must be construed as having been intended to operate to deter the railroad company from contesting the validity of the statute, thereby depriving the railroad company of liberty and property without due process of law, and denying it the equal protection of the laws.

(c) It was not a regulation of Interstate Commerce within
79 the meaning and intent of the Commerce Clause of the Constitution of the United States, but was an absolute prohibition of the transportation of property in interstate commerce, which prohibition was not made for any purpose within any power in that behalf possessed by Congress under the Commerce Clause of the Constitution.

Fourteenth. The Court erred in denying defendant's motion for an arrest of judgment upon the ground that the evidence was insufficient to warrant a verdict.

Fifteenth. The Court erred in using the following language in its charge to the jury, to wit:

"The thing which was transported, that is, the hay, must be owned by the railroad company which transports it. As you doubtless noticed, there is a difference of opinion on that subject, but for the present you will be guided by my opinion, which is that under this contract in writing, the railroad company did own this hay when it transported the hay from Buffalo to Scranton. Now, there is the second requisite, which on the evidence has plainly been fulfilled."

Sixteenth. The Court erred in using the following language in its charge to the jury, to wit:

"It is for you under the language of this Act and the form of this Indictment to say whether this hay was necessary for the conduct of the business of the Lackawanna Railroad as a common carrier".

Seventeenth. The Court erred in using the following language in its charge to the jury, to wit:

"First, would you regard hay for mules and horses as so necessary in the production of coal as to render the hay itself necessary in the conduct of the business of the Lackawanna Railroad as a common carrier? If it is not necessary, why then, they had no right to carry it."

80 Eighteenth. The Court erred in using the following language in its charge to the jury, to wit:

"What I have charged is that it is for them (the jury) to say whether hay for mules and horses is a necessity in the sense of the statute, for the conduct of the business for the Lackawanna Railroad as a common carrier."

Wherefore, the said defendant and plaintiff in error, The Delaware, Lackawanna and Western Railroad Company, prays that the Judgment of the District Court of the United States for the Western District of New York against it, be reversed, and that the said District Court be directed to grant a new trial of said cause, or that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided.

WILLIAM S. JENNEY,
Attorney for Defendant and Plaintiff in Error.

Office & Post Office Address No. 90 West St., New York City.

(Endorsed:) 821. United States District Court, Western District of New York. The United States of America, vs. The Delaware, Lackawanna and Western Railroad Company. Assignment of

Errors. William S. Jenney, Attorney for Defendant. Office & Post Office Address No. 90 West St. New York City. Due service of a copy of within Assignment of Errors is admitted this 11 day of April, 1912. John Lord O'Brian, U. S. Attorney. Filed Apr. 17, 1912. Sidney W. Petrie, Clerk.

81 The District Court of the United States for the Western District of New York.

THE UNITED STATES OF AMERICA, Plaintiff,
against
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant.

Supersedeas.

Whereas, judgment was rendered and sentence was pronounced against The Delaware, Lackawanna and Western Railroad Company, defendant above named, on March 19" 1912, and said defendant having filed its petition for a Writ of Error and an Assignment of Errors, and said Writ of Error having been allowed by this Court, and having been duly served on The United States of America, plaintiff above named, and a Citation pursuant to said Writ of Error having been issued, and the security required by law on the issuing of the Citation having been waived:

Now, on Motion of William S. Jenney, Attorney for the defendant, The Delaware, Lackawanna and Western Railroad Company, it is

Ordered, That said Writ of Error operate as a supersedeas and a stay of all proceedings under said judgment and sentence and that the execution thereof be suspended and stayed pending the hearing and determination of said Writ of Error.

Dated, Buffalo, N. Y., April 5, 1912.

C. M. HOUGH,
United States District Judge.

(Endorsed:) 821. The United States District Court, Western District of New York. The United States of America, vs. The Delaware, Lackawanna and Western Railroad Company. Supersedeas. William S. Jenney, Attorney for defendant. Office & Post Office Address No. 90 West St., New York City. Due service of a copy of within Supersedeas is hereby admitted this —" day of April, 1912. John Lord O'Brian, United States Attorney. Filed Apr. 17, 1912. Sidney W. Petrie, Clerk.

UNITED STATES OF AMERICA,
Western District of New York, ss:

I, Sidney W. Petrie, Clerk of the District Court of the United States for the Western District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error and in obedience thereto, do hereby certify that the foregoing Pages numbered "1" to "81,"

inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause entitled The Delaware, Lackawanna and Western Railroad Company, Plaintiff in Error, against The United States of America, Defendant in Error, as the same remain of record and on file in said Court.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Buffalo, in the Western District of New York, Second Circuit, this 8th day of June, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-sixth.

[Seal United States District Court, Western District of New York.]

S. W. PETRIE, *Clerk.*

83 By the Honorable Charles M. Hough, one of the Judges of the District Court of the United States for the Western District of New York, in the Second Circuit.

To The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington on the fifteenth day of May next, pursuant to a Writ of Error filed in the Clerk's office of the United States District Court for the Western District of New York, wherein The Delaware, Lackawanna and Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Buffalo, in the Circuit and District above named, this fifteenth day of April, in the year of our Lord one thousand nine hundred and twelve.

C. M. HOUGH,
Judge of the District Court of the United States for the Western District of New York.

84 [Endorsed:] 821. The United States District Court, Western District of New York. The United States of America vs. The Delaware, Lackawanna and Western Railroad Company. Citation. William S. Jenney, Attorney for Defendant, Office and Post Office Address No. 90 West St., New York City. Due service of a copy of within citation is hereby admitted this 17th day of April, 1912. John Lord O'Brian, United States Attorney.

85 Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,
against
THE UNITED STATES OF AMERICA, Defendant in Error.

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the Supreme Court of the United States pursuant to the writ of error sued out from the United States District Court, Western District of New York, is extended until the 15th day of June, 1912.

C. M. HOUGH,
United States District Judge.

Dated, 13 May, 1912.

86 [Endorsed:] Supreme Court of the United States. The Delaware, Lackawanna & Western Railroad Company, Plaintiff in Error, against The United States of America, Defendant in Error. Order Extending Time to File Record.

Endorsed on cover: File No. 23252. W. New York D. C. U. S. Term No. 677. The Delaware, Lackawanna and Western Railroad Company, plaintiff in error, vs. The United States of America. Filed June 11, 1912. File No. 23,252.

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No. 375

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION BY THE UNITED STATES TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE DELAWARE, LACKAWANNA & WESTERN Railroad Company, plaintiff in error.

v.

THE UNITED STATES.

No. 677.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

The Attorney General, on behalf of the United States, moves that this case be advanced for hearing at the next term.

This is a criminal proceeding arising under that portion of section 1 of the act of Congress approved February 4, 1887, entitled "An act to regulate commerce," as amended by the act of June 29, 1906 (34 Stat., 584, 585), commonly known as the "commodities clause."

Plaintiff in error was convicted of violating the statute by transporting over its road, from Black Rock, N. Y., to Scranton, Pa., at various times, 20 shipments of hay, consigned to itself, which it owned and controlled, and which were not necessary for its

use in the conduct of its business as a common carrier. A fine of $100 was imposed on each of the 20 counts of the indictment, making a total of $2,000.

The trial court overruled certain motions which challenged (1) the sufficiency of the evidence, and (2) the constitutionality of the act, which rulings are assigned as error in this court.

As these questions affect the general administration of the interstate-commerce act, it is a matter of public importance that they be settled as promptly as possible.

Opposing counsel concur.

J. C. McREYNOLDS,
Attorney General.

J. A. FOWLER,
Assistant to the Attorney General.

○

[redacted]

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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 275.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the Western District of New York to review a judgment upon a verdict of a jury convicting plaintiff in error (hereinafter called defendant) of twenty separate charges of violating paragraph five of section one of the act to regulate commerce (as amended June 29, 1906, 34 Stat., 584), commonly known as the Commodities Clause, which provides that—

> From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad

> company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

The indictment was in twenty counts, each count charging defendant with having transported over its railroad from Black Rock (part of Buffalo), N. Y., to Scranton, Pa., a certain shipment of hay, consigned by and to itself, of which it was the sole owner, and which was not necessary or intended for use in the conduct of its business as a common carrier. (Rec. 4.) A fine of $100 was imposed on each count, making a total fine of $2,000. (Rec. 20.)

THE FACTS.

The hay was purchased by defendant from the Vassar Hay & Produce Co. of Vassar, Mich., under a contract dated August 21, 1909, the full text of which is in the printed record at page 37. In substance, this contract provided that the vendor should "sell and deliver to the purchaser, f. o. b. on the tracks of The Delaware, Lackawanna and Western Railroad Com-

pany, at Buffalo, N. Y." 3,000 tons of No. 1 timothy hay of a prescribed standard, in certain designated monthly installments; that the purchaser should pay for the hay so to be delivered at the rate of $15.40 per ton "f. o. b. Buffalo, N. Y."; that from Buffalo the purchaser would transport the hay to points along its line of railroad and there inspect the same before acceptance; and that should the hay conform to the requirements of the contract it should be accepted by the purchaser and paid for within 30 days.

All of the hay involved in these shipments was accepted and paid for by defendant. (Rec. 40, 41.)

The shipments were consigned by the vendor to the purchaser over the line of the Michigan Central Railroad Co. from Millington, Mich., to Buffalo, N. Y., at which point they were received by defendant's local freight agent and were by him reconsigned over the line of the defendant to Scranton, Pa. (Rec. 21, 22.) From Millington to Buffalo the shipments were billed under a local rate of 17 cents per 100 pounds. (Rec. 42, Ex. 5.) Upon receipt of the shipments at Buffalo, defendant caused the freight to be prorated on the basis of a through shipment from Millington to Scranton, and paid to the Michigan Central only its proportion of such through rate, amounting to 13.133 cents per 100 pounds. The amounts thus paid to the Michigan Central were deducted by the defendant from the purchase price of the hay. (Rec. 40, 41.) From Buffalo to Scranton the shipments were transported over defendant's railroad, billed "Free Company Use," and were

carried free of charge. (Rec. 24; Rec. 42, Ex. 5.) As a result of this arrangement it is apparent that the vendor actually received for the hay, in addition to the purchase price fixed by the contract, the difference between the local rate and the through rate, amounting to approximately 75 cents per ton.

The defendant, in addition to being a common carrier, is engaged in competition with others in mining and selling anthracite coal, it being the owner or lessee of large collieries in and near the city of Scranton. (Rec. 23.) At these mines two distinct grades of coal are produced, namely, prepared sizes and steam sizes, the former constituting by far the larger proportion, being fully 75 per cent of the entire output. All of the prepared sizes are sold by defendant at the mines to The Delaware, Lackawanna and Western Coal Company, which in turn markets the coal in competition with other mine operators. The steam sizes, which make up the remaining 25 per cent of the production of defendant's mines, are commercially of less value than the prepared sizes (about one-third as valuable), and are consumed by defendant in the operation of its collieries and its railroad. (Rec. 23, 24.) The hay in question was intended to be fed to the horses and mules used in the operation of such collieries. (Rec. 23.)

In accordance with the regular practice of the company, upon delivery at the mines, the shipments were inspected by the barn boss, outside foreman, assistant foreman, or other employee, who thereupon

reported to the company, upon a form regularly provided for that purpose, the amounts accepted and the amounts rejected, and payment was made upon the basis of this report. (Rec. 22, 23, 44.)

THE QUESTIONS.

The assignments of error relied upon by the defendant raise but two questions:

1. Was the defendant the owner of the hay while transporting it from Black Rock (Buffalo) to Scranton?

2. If it was the owner, is the Commodities Clause constitutional as applied to such a case?

THE ARGUMENT.

First Point.

THE DEFENDANT WAS THE OWNER OF THE HAY WHILE TRANSPORTING IT FROM BLACK ROCK (BUFFALO) TO SCRANTON.

I.

The pertinent provisions of the contract are as follows:

> First. The vendor agrees to sell and deliver to the purchaser, f. o. b. on the tracks of the Delaware, Lackawanna & Western Railroad Company, at Buffalo, New York, three thousand (3,000) tons (of 2,000 pounds each) of No. 1 timothy hay of the standard required by the National Association, in bales, on terms and according to the provisions hereinafter set forth.
>
> * * * *

> Third. The purchaser agrees to pay to the vendor for all hay delivered to it hereunder, as hereinafter provided, fifteen dollars and forty cents ($15.40) per ton f. o. b. Buffalo, N. Y. Payment for the hay shall be made as follows, viz: Upon the delivery of the hay to the purchaser at Buffalo, N. Y., the same will be transported by the purchaser to points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance; and if upon such inspection the said hay shall prove to be of the kind and quality hereinbefore specified, and shall conform in all respects to the requirements of this contract, the purchaser shall accept such hay and pay for the same within thirty days after such acceptance.

The Government contends that under these provisions ownership passed from the vendor to the purchaser (the defendant) upon delivery of the hay to the purchaser at Buffalo.

It is elementary that in executory contracts for the sale of unascertained goods such as this an appropriation of specific goods and an assent by the purchaser to become the owner of the goods so appropriated are necessary to transfer title.

In this case the contract clearly provides for the appropriation by authorizing the vendor to deliver the hay to the purchaser at Buffalo in certain designated monthly installments. The only question is as to when and where the purchaser assented to become the owner of the hay. Upon the delivery at Buffalo? Or only after the inspection at the mines?

II.

Where an executory contract for the sale of unascertained goods authorizes the vendor to make an appropriation of specific goods by delivering them to the purchaser at a designated time and place, the purchaser will be presumed to have assented to become the owner of the goods upon such delivery unless a contrary intention affirmatively appears. In other words, delivery of the goods by the vendor pursuant to the contract presumably marks the transfer of title.

Below we quote from the authorities some statements of this principle:

Hatch v. *Oil Co.* (100 U. S., 124, 135):

> Much discussion is certainly unnecessary to show that, where the terms of bargain and sale are in the usual form, an absolute delivery of the article sold vests the title in the purchaser, as the authorities upon the subject to that effect are numerous, unanimous, and decisive. *Hyde* v. *Lathrop*, 3 Keyes (N. Y.), 597; *Macomber* v. *Parker*, 13 Pick. (Mass.), 175, 183.
>
> In an action for goods sold and delivered, if the plaintiff proves delivery at the place agreed and that there remained nothing further for him to do, he need not show an acceptance by the defendant. *Nichols* v. *Morse*, 100 Mass., 523.
>
> * * * * *
>
> Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done

in order to ascertain the total value of the goods at the rates specified in the contract. *Burrows* v. *Whitaker*, 71 N. Y., 291–296; *Graff* v. *Fitch*, 58 Ill., 373; *Russell* v. *Carrington*, 42 N. Y., 118, 125; *Terry* v. *Wheeler*, 25 id., 520, 525.

Cornell v. *Clark* (104 N. Y., 451, 456):

> Where the delivery is absolute, it furnishes the strongest evidence of an intent to pass the title. The voluntary surrender by the vendor, of all dominion over the property is, as a general rule, inconsistent with the idea that the title is retained by the vendor.

Lingham v. *Eggleston* (27 Mich., 324), where Cooley, J., said (328):

> The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser it is usually very strong, if not conclusive, evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards.

Graff v. *Fitch* (58 Ill., 375, 377):

> Where the goods are actually delivered, that shows the intent of the parties to complete the sale by the delivery.

Macomber v. *Parker* (13 Pick., Mass., 175, 183):

> But where the goods or commodities are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting

afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price.

Kelsea v. *Haines* (41 N. H., 246, 254):

> Thus, where a quantity of goods agreed to be sold is delivered, the sale is complete, though they are still to be counted, weighed, or measured in order to determine the sum to be paid for them. The act of delivery shows that it was intended thereby to complete the sale.

Williston on Sales (sec. 278, p. 402):

> As hereafter will be noticed, a buyer has the right to inspect the goods in order to satisfy himself that the seller has fulfilled the authority conferred upon him to appropriate goods to the bargain, but this right of inspection is not a condition precedent to the transfer of the property in cases where the seller has been authorized to make an appropriation. If the seller conforms to the authority given him, the property passes and the buyer's subsequent inspection merely enables him to satisfy himself that because the authority given the seller was properly exercised the property passed.

III.

Where an executory contract of sale reserves to the purchaser the right to inspect the goods at a different time and place from the time and place of delivery, transfer of title is not postponed until after the inspection but is effective upon the delivery of the

goods unless a contrary intention affirmatively appears.

In other words such a right of inspection does not create a condition precedent to the passing of title but simply a condition subsequent which survives the transfer of title and gives the purchaser the right to rescind the contract if the goods do not meet the requirements.

This principle is grounded in reason and justice. Inasmuch as the provisions for inspection after delivery are for the convenience of the purchaser, it would be unjust to the vendor to regard the goods as his and at his risk while in the possession and control of the purchaser in the interval between delivery and inspection, unless, of course, he has clearly agreed that they shall be so regarded. The purchaser is protected against a possible failure of the goods to meet the requirements by his right to rescind the contract if they do not. The reason is particularly apparent in a case like this where an indefinite time may elapse between the delivery and the inspection.

This principle is also supported by the reasoning of many adjudged cases.

Williston in his work on Sales says (sec. 474, pp. 833, 834):

> In many cases, also, where goods are taken into the buyer's possession and retained for a considerable time prior to examination, it seems far more just to regard the condition imposed by the right of inspection as subsequent rather than as precedent. Where goods

> are taken into the buyer's possession and examination is deferred for his convenience until an indefinite time in the future, it is a harsh rule if the goods are held to be still the property of the seller and at his risk. It would be more just, and it would be inconsistent with no decisions, to hold that if the examination is deferred for the buyer's convenience beyond the time when the goods are delivered and could be examined, title passes, subject to the right of the buyer to throw back the title if the goods are not what the bargain required.

In *Gass* v. *Astoria Veneer Mills* (121 App. Div. N. Y., 182), the Appellate Division of the Supreme Court of New York held that title to a shipment of lumber passed to the purchaser upon delivery and before inspection, saying (p. 184):

> It may be assumed that there was, as between the vender and purchaser, a right on the part of the plaintiff to inspect the lumber, and to reject the same if it did not come up to the requirements, but there can be no presumption that the sellers violated the obligations of their contract, and clearly in the absence of allegations and proofs showing that the lumber was not such as the contract called for there can be no doubt of the fact that upon delivery by the carrier at the point designated in the contract the title would vest immediately in the plaintiff, and the lumber would thereafter be at the risk of the plaintiff.

In *Burrows* v. *Whitaker* (71 N. Y., 291), the defendant contracted to purchase all the lumber which plaintiff should deliver at a certain place within a certain time at a stipulated price for the good and for the culled. Plaintiff began delivering the lumber, which was swept away by a freshet before it could be counted or measured. It was held that title to the lumber passed upon delivery at the appointed place notwithstanding that it had not been counted or measured, the court saying (p. 296):

> In the case at bar there is strong ground for claiming that the fair interpretation of the contract is, that title should pass upon delivery of the lumber upon the bank, and it being thus delivered at a place designated by the defendant, it passed into his possession, and, as some of the testimony shows, was there piled and culled by an agent in the defendant's employment. The delivery was thus complete, and the culling of the entire quantity or even the counting or measurement of the same was not an essential element to the validity of the contract. This condition was not a condition precedent, upon which the execution of the contract depended.

In *Langham* v. *Eppleston* (27 Mich., 324), heretofore referred to, Cooley, J., said (p. 328):

> If the goods be completely delivered to the purchaser, it is usually very strong, if not conclusive, evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards.

In *Kuppenheimer* v. *Wertheimer* (107 Mich., 77; 64 N. W., 952) the defendant ordered goods from Illinois by sample and directed them to be shipped to his place of business in Michigan, where he was to have the right before payment to inspect them in order to ascertain whether they corresponded to the samples. The court held that the transfer of title was not postponed until after the inspection of the goods at the place of business of the purchaser in Michigan, but took place upon the delivery to the carrier in Illinois, saying (p. 81):

> The right to inspect before acceptance always exists, and a purchaser can not be required to inspect at the shipping point, but is entitled to a reasonable opportunity after the arrival of the goods. * * * If the goods are not up to the sample, the right to refuse them exists, which is, in effect, a rescission. The title passes upon delivery to the carrier, subject to this right, of which the purchaser may avail himself or not. Upon the facts shown, the court properly held that title passed by delivery to the carrier.

In *Macomber* v. *Parker* (13 Pick., Mass., 175) it was held that title to a quantity of bricks passed to the purchaser upon delivery notwithstanding that they had not been counted by the purchaser.

In *Allen Bethune & Co.* v. *Maury & Co.* (66 Ala., 10), involving a contract for the sale of cotton which reserved to the purchaser the right to inspect and reweigh the cotton after delivery and to reject any

bales found to have been falsely packed, the court held that title passed upon the delivery, saying (p. 17):

> Where, however, goods are sold and delivered, the terms of sale being specified, and the vendee reserves the right to reject or return, the title passes, liable to be divested by the exercise of this option to rescind, expressed within a reasonable time. When there is a warranty by the seller, express or implied, this right would exist, without any special stipulation to that effect in the contract of sale. If the seller fails to deliver that which he has agreed to sell, the purchaser may rescind the contract, and return the goods, or retain them and claim a deduction for their relative inferiority in value.

In *Wadhams* v. *Balfour* (32 Ore., 313, 51 Pac., 642) a sale of wheat by sample was involved. It appeared that in previous transactions between the parties the buyer had exercised the right to inspect the grain and that claims for variations based upon such inspection were adjusted at his dictation. The wheat having been destroyed in this instance before the inspection, it was held that the title passed to the purchaser upon delivery of the bill of lading, the court saying (p. 322):

> But many things which are often made essential by the parties in an executory agreement to sell may become nonessentials after delivery; that is to say, many provisions (and these may be expressed or implied) which are impressed by the contract with the quality of conditions precedent in the one case are

> regarded as conditions subsequent in the other. So it is where there has been an unconditional delivery of the specific property and something remains to be done, as measuring, weighing, and the like, for the purpose of ascertaining the price at the rate agreed upon; these things become and are regarded as conditions subsequent, and the title will pass with the delivery.

See also:

> *Leonard* v. *Davis* (1 Black U. S., 476, 482–483);
> *Graff* v. *Fitch* (58 Ill., 373);
> *Crofoot* v. *Bennett* (2 N. Y., 258);
> *Fromme* v. *O'Donnell* (124 Wis., 529);
> *Riddle* v. *Varnum* (20 Pick., 280); and
> *Young* v. *Winkler* (14 Colo., App. 204).

We will now examine the cases cited by defendant as taking a contrary view of the law.

In general those are cases where the seller contracted to deliver to the buyer himself. In such cases (unlike those where the seller contracts merely to deliver to a carrier) it is generally recognized that a right of inspection exists as a condition precedent to the transfer of title, just as in the case of face-to-face transactions in a merchant's shop. Several of defendant's cases are cited in *Williston on Sales*, section 472, note 63, to support that very principle. The present case, however, is of the sort described and distinguished by the same writer in section 474, where the inspection is postponed for an indefinite time for the convenience of the buyer, and where to postpone the transfer of title, exposing the seller to risk of loss for

the convenience of the buyer, would work a palpable injustice. In such cases the right of inspection exists, but is a condition subsequent. Besides this general distinction, some of the cases cited have other distinguishing features which will now be noticed.

Star Brewing Co. v. *Horst* (120 Fed. 246, C. C. A.). This involved a contract made in 1890 to deliver hops of the 1895 crop f. o. b. Belleville, Indiana, where the buyer resided and where he agreed to "purchase, pay, and receive" the hops. On arrival at Belleville he refused even to take possession of them, and they were lost in the railroad's hands. The case therefore falls clearly within the rule laid down in section 472 of *Williston on Sales* that—

> delivery when made directly from one party to the other requires assent to take as well as assent to give. Accordingly, the buyer, by refusing to take the goods, can always prevent delivery and thereby, where the property is not to pass until delivery, prevent it from passing.

Holmes v. *Gregg* (66 N. H. 621). This was a sale of lumber by a Chicago firm to a manufacturer in Nashua, New Hampshire. The lumber arrived in box cars where it could not be inspected. The buyer unloaded the lumber and finding that 2 out of 5 lots did not conform to the order in dimensions, quantity, quality, or price, he rejected those 2, tendering the price of the other 3. The seller sued for the whole price. The court held that the buyer had the right to accept the lots that conformed with the order and reject the rest. There is nothing in the brief opinion

of the court to show whether the right of inspection was a condition precedent or subsequent. Even regarding it as a condition precedent, the case falls within the class above referred to where inspection is contemporaneous with delivery.

McNeal v. *Braun* (53 N. J. L., 617). The contract called for the delivery of coal f. o. b. Burlington, N. J. After the coal barge had been made fast to the wharf and the buyer had made preparations to unload, and had in fact unloaded a small quantity of the coal, the barge sank. The court held that the title had not passed and accordingly the loss fell upon the seller. This is exactly the same sort of case as the two preceding, and is cited by Mr. Williston to support section 472, *supra*. The clear distinction between it and the present case is that there the *inspection was to be contemporaneous with delivery*, whereas here the inspection is postponed for the convenience of the buyer.

Cornell v. *Clark* (104 N. Y., 451). The vendor agreed to deliver on a railroad's land 20,000 ties, the railroad to pay "55 cents each for first-class ties and 35 cents each for what shall be adjudged second-class ties, to be inspected and counted by Mr. Emerson." The court, holding that title did not pass prior to the selection of first and second class ties from the mass, said (456–457):

> The power of rejection was involved in the power of selection. The inspector might reject unmerchantable ties not coming within either of the classes mentioned. It could not be known until the inspection had been had

> and a separation made what part of the ties should be taken. * * * *The case is within the general principle that where anything remains to be done to ascertain and identify the subject of the sale*, the title does not pass. What was left to be done was not simply to determine by count or by a division of the whole number of ties into two classes, the amount remaining unpaid, *but it involved identification and specification also.* The case is unlike *Burrows* v. *Whitaker* (71 N. Y., 291) [*supra*]. In that case the vendee was to take all the lumber delivered irrespective of selection. Nothing remained to be done except its separation into classes. In this case the company was bound to take only such part of the ties as should be adjudged by the inspector to be first or second class ties. (Italics ours.)

In the present case the inspection is not for the purpose of *identifying* the hay. It is rather like the case of *Burrows* v. *Whitaker*, from which the New York court itself distinguished the *Cornell* case. Furthermore, even were it not distinguishable from the present case, *Cornell* v. *Clark* is in direct conflict, it is submitted, with the decision of this court in *Leonard* v. *Davis* (1 Black, U. S., 476).

Potter v. *Holmes* (92 N.W., 411, Minn.). The court held there that under a contract providing that the buyer should "pay for all said ties that have been inspected and accepted by the Northern Pacific Railroad Company," the title to the ties passed to the buyer upon a refusal to inspect. The contract contained a

further clause which clearly distinguishes that case from this, namely, that—

> Until the ties to be delivered under this contract should be inspected and accepted by the Northern Pacific Railroad Company, the appellants (sellers) should assume all risk of loss or damage thereto from any cause, including that by fire communicated by the engine or cars of the company (p. 411).

Of course, such a provision is practically the equivalent of an express statement that title shall remain in the seller, inasmuch as risk and title normally go together. In the present case there is no such unequivocal language to rebut the strong presumption arising from the postponement of inspection for the convenience of the buyer.

Ballantyne v. *Appleton* (82 Me. 570). In that case pulp wood was to be delivered by the seller upon the buyer's premises and there surveyed by the buyer's surveyor. When only a part of the wood had been delivered, none of which had been surveyed, the buyer became insolvent. The seller thereupon claimed the wood as his own, to which the buyer replied "all right." The court was clearly right in holding, first, that this was a rescission of the partly performed contract, but in error, we submit, in further basing its decision upon the second ground that title had not passed because something was still to be done by the buyer. Maine is one of the few jurisdictions failing to distinguish between cases where the thing to be done (like measurement to ascertain

the price) is to be done by the *seller*, and cases where it is to be done by the *buyer after delivery*. The very great weight of authority holds that title passes on delivery in the latter cases. (*Hatch* v. *Oil Co.*, 100 U. S., 124, 135, and other cases *supra*, pp. 7–9; *Williston on Sales*, sec. 269, citing in note 43 the *Ballantyne* case, *supra*, as illustrating the minority view.)

Cefalu v. *Fitzsimmons* (67 N. W. (Minn.), 1018). This case held that where bananas had been shipped from New Orleans to the buyer at St. Paul, and by him shipped to Duluth before inspection, the seller might waive the buyer's failure to inspect the bananas at St. Paul and permit him to reject them at Duluth. The statement in the defendant's brief (p. 35) that the court held that title did not pass at St. Paul seems to be the defendant's interpretation of the final holding of the court rather than an accurate paraphrase of what the court actually said. The normal assumption in such a case would be that title passed upon delivery to the carrier at New Orleans, subject to divestment on inspection at St. Paul, as on a condition subsequent, and the opinion of the court is entirely consistent with that theory. In any case, the title must have passed at St. Paul, when the *buyer* waived inspection, subject to divestment at Duluth, with the express and contemporaneous consent of the seller.

Grimoldby v. *Wells* (L. R., 10 C. P., 391). The tares were delivered in sacks half way between the houses of buyer and seller (9 miles apart). When opened in the buyer's barn they proved not equal to

the sample. It was held that he might "reject" them. The use of the word "reject" implied that inspection was a condition *subsequent*, as in the ordinary case of delivery to a carrier where the parties must anticipate inspection at the end of the journey. In any event, inspection was postponed for the convenience of the buyer, not indefinitely (as in the present case), but only for a short cart haul.

Perkins v. Bell (1 Q. B. (1893), 193). The very point of this case, as the passage quoted in defendant's brief shows, is the strong presumption in favor of the passing of title to the buyer when inspection is to be postponed. As the court says (p. 197):

> To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into.

The case is authority against, rather than for, defendant.

IV.

It follows from the foregoing discussion that under the contract in the present case title to the hay passed upon delivery to the purchaser (the defendant) at Buffalo, unless the parties have indicated a contrary intention.

The defendant contends that by the third section of the contract, which we quote again for convenience, the parties indicated their intention that title should not pass until after the inspection of the hay at the points where it was to be used.

> Third. The purchaser agrees to pay to the vendor for all hay delivered to it hereunder, as

> hereinafter provided, fifteen dollars and forty cents ($15.40) per ton f. o. b. Buffalo, N. Y. Payments for the hay to be made as follows, viz: Upon the delivery of the hay to the purchaser at Buffalo, N. Y., the same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance; and if upon such inspection said hay shall prove to be of the kind and quality hereinbefore specified, and shall conform in all respects to the requirements of this contract, the purchaser shall accept such hay and pay for the same within thirty days after such acceptance.

More fully stated, the contention is that by providing that "the purchaser shall have the right to inspect said hay before acceptance" the parties intended that the vendor should remain the owner and continue to bear the risks of ownership during all the time that the hay was being "transported by the purchaser to various points on its line of railroad to be determined by the purchaser", and thereafter until the purchaser should have inspected it, notwithstanding that during all this time the hay was in the absolute possession and control of the purchaser.

The grounds for inferring any such intention should be very clear indeed, and we submit that they are anything but clear.

This section of the contract relates to the payment of the price, and it is not difficult to ascertain its purpose if the whole section is read and the references

to acceptance of the hay are not separated from their context.

Thus read, it becomes clear that the purpose of the section was not to postpone the transfer of title until after the inspection, but to postpone the *time of payment* until after the goods had been inspected and approved or accepted as meeting the requirements of the contract. Without such a provision payment would have been due immediately upon delivery. This construction, unlike that contended for by the defendant, is consonant with reason and at the same time gives full effect to the words of the agreement.

The word "acceptance" has a double use. It is used as a term of art in the law of sales to signify the purchaser's assent to become the owner of the property. It is also used quite generally to signify approval. For example, it is said, "the goods have been inspected and accepted", meaning that they have been inspected and approved as meeting the requirements of the contract. That is the sense in which the word was used here.

Its use in that sense is common, even in legal discussion. It was so used in the opinion of this court in *Hatch* v. *Oil Company* (100 U. S., 124, 135) and in *Kuppenheimer* v. *Wertheimer* (107 Mich., 77, 81) above referred to. The double use of the word is also referred to by Williston in his work on Sales, who states that it has led to confusion (sec. 482):

> Much confusion has been caused in the law of some States by the assumption that accept-

> ance of the goods means not only an assent to become owner of them, but also an agreement that the goods thus received fulfill in every respect the legal obligation of the seller.

The same writer himself uses the word in its double meaning, saying (sec. 492):

> whether *acceptance* by the buyer is merely an assent to become owner, *or is an agreement that the transfer of the property shall be a complete satisfaction of the seller's obligations*, the acceptance is subject to the universal rule that assent procured by fraud or given under a mutual mistake of fact of both parties may be rescinded. (Italics ours.)

The following are additional cases illustrating the use of the words "accept" or "acceptance" in the sense of "approval upon inspection" where the title to the goods has already passed and the right of inspection is only a condition subsequent:

Pope v. *Allis* (115 U. S., 363, 372):

> The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained and delivers them to the carrier for the purchaser, the latter is not bound to *accept* them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to *accept* them. (Italics ours.)

Pierson v. *Crook* (115 N. Y., 539, 548):

> We are, however, of opinion that where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received *and accepted* at their ultimate destination, and that the carrier is not the agent of the vendee *to accept* the goods as corresponding to the contract, although he may be his agent to receive and transport them. * * * There can be no doubt that on delivery to the carrier of iron corresponding with the contract the title would immediately vest in the purchasers, and the iron would thereafter be at their risk. * * * But assuming that the title to the iron for some purposes vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title, subject to the right of inspection and rejection for inferior quality on arrival at New York. (Italics ours.)

Aldew v. *Hart* (161 Mass., 576, 582):

> Assuming that the title to the coal had passed to the defendants subject to examination and *acceptance* or rejection by them, we think that everything was done by them necessary to a rescission of the contract. (Italics ours.)

Fogle v. *Brubaker* (122 Pa. 7, 15):

> It is true that a delivery to the carrier is for many purposes a delivery to the purchaser, but such delivery is constructive merely. The obligation to *accept* or reject the article arises, however, only upon an actual delivery. It is when the articles come under the observation of the purchaser and he is able to see whether they are such as he has ordered, that he is bound to elect whether to *accept* them or not. (Italics ours.)

V.

We do not rest, however, as we might, with this showing that the defendant has failed to discharge its burden of proving that the parties intended to postpone the transfer of title to the hay in question until after its arrival and inspection at the points where it was to be used. We go further and maintain upon the following grounds that it *affirmatively* appears that such was not the intention of the parties, but that their intention was that title should pass upon delivery of the hay at Buffalo:

1. The contract reads:

> The vendor agrees to sell and deliver to the purchaser, f. o. b. on the tracks of the Delaware, Lackawanna & Western Railroad Company at Buffalo, N. Y., 3,000 tons of No. 1 timothy hay. * * *

The words "*sell and deliver* * * * *f. o. b.* * * * at *Buffalo, N. Y.*" clearly indicate that the parties meant to effect a change of ownership at that point. (See *United States* v. *Andrews*, 207 U. S., 229; *Fromme*

v. *O'Donnell*, 124 Wis., 529; *Murphy* v. *Sagola Lumber Co.*, 125 Wis., 363; *Weil* v. *Stone*, 69 N. E. (Ind.), 698.)

In *Fromme* v. *O'Donnell* (124 Wis., 529), the assignor of the plaintiff had contracted to furnish the defendant "enough" pine blocks to pave a certain viaduct, at a stated price per square yard, f. o. b. cars at Milwaukee, Wis., where the blocks were to be used. It was contended that as the measurement could not be made until the blocks were laid, title to them did not pass until that time, but the court held that title passed upon the delivery of the blocks to the defendant, saying (p. 531):

> It seems that controlling significance was given by the learned circuit judge to that feature of the contract indicating that the title to the paving material was to and did pass to the appellant upon his accepting the same from the cars at Milwaukee. It was to be furnished at $1.85 per square yard, "f. o. b. cars at Milwaukee, Wis." *The quoted term unmistakably shows that the parties intended a change of title upon delivery.* (Italics ours.)

Had the vendor intended to remain the owner of the hay after delivering it to the purchaser f. o. b. at Buffalo, is it not to be presumed that he would have insisted upon the contract definitely fixing the liability for the freight charges incurred in the transportation of the hay beyond Buffalo?

The presumption that in such a case the parties intended title to pass upon delivery is not rebutted by a provision in the contract for inspection before

"acceptance." This follows from the discussion under the preceding subdivision of the argument. The following additional cases are referred to here because especially in point.

Boothby v. *Plaisted* (51 N. H. 436). This was a suit for the price of liquor. The defense was that the sale was in New Hampshire, and in violation of the laws of that State. The liquor had been bought by sample from a New York wholesaler under an agreement that the buyer—

> after the liquors arrived at his store, might examine them, and if not according to sample *he need not accept* the same.

The court held that the title passed in New York when specific goods were appropriated to the contract, saying (p. 437):

> We cannot see that the additional provision as to *acceptance* is anything more than the law implies in every contract where a sale is made by sample or with warranty, except that in this case it was agreed that the defendant should decide for himself whether or not the goods were according to sample. (Italics ours.)

McCarty v. *Gordon* (16 Kans., 35, 37). Gordon, a wholesale liquor merchant in St. Louis, had sold liquor by sample to be sent to McCarty in Leavenworth, Kans. In an action for the price of the liquor, McCarty pleaded that the title passed in Leavenworth and that the sale was illegal in Kansas.

To distinguish the case from the ordinary case of shipment by a carrier, he relied upon the fact that—

> it was expressly agreed that the goods were not to be received and *accepted* by McCarty unless they "proved identical with the order given, in quality and in quantity," and that he "reserved the right to reject the liquors, so ordered and sent, for any deficiency in quality or quantity; and in case of such deficiency to return the goods to plaintiff." (Italics ours.)

But the court, in holding that the title passed on delivery of the goods to the carrier in St. Louis, said of the attempted distinction:

> We cannot see that this difference is material. The express contract was no more than the one the law would imply from a sale by sample. It is always understood that a party purchasing by sample is under no obligation to receive the goods sent unless they correspond with the sample and are equal to the quantity ordered. The case of *Boothby* v. *Plaisted*, 51 N. H. 436 (also a liquor case), is exactly in point, and sustains the views we have expressed.

2. In their actual dealings under the contract both parties treated the hay as if the purchaser (the defendant) became the owner thereof at Buffalo. The vendor absolutely relinquished possession into the hands of the purchaser (the defendant) at Buffalo. The purchaser (the defendant) thereupon reconsigned the hay to itself at Scranton, Pennsylvania,

billed "Free Company Use", and transported it to destination free of charge. How could the parties have more plainly indicated their purpose that the ownership of the hay should pass to the purchaser (the defendant) at Buffalo?

3. If the vendor was the owner of the hay while it was being transported by the purchaser over its railroad free of charge, then both parties were violating the Elkins Act (32 Stat., 847), the one by receiving a rebate, the other by giving it, and the responsible heads of both were subject to imprisonment. It is utterly unreasonable to infer that they had any intention of exposing themselves to such risks.

As to this, defendant says that it had the right by contract with the vendor to assume the freight charges from Buffalo to destination, though the ownership of the hay remained in the vendor during such transportation. (Br., pp. 23, 24.) The reply is, first, that conceding that defendant had the right so to contract, it has not done so; and, secondly, that it is at least doubtful whether it could lawfully make any such contract, since freight rates must be paid in cash or its equivalent. (*C. I. & L. R. Co.* v. *U. S.*, 219 U. S. 486; *L. & N. R. Co.* v. *Mottley*, 219 U. S. 467; *U. S.* v. *Sunday Creek Co.*, 194 Fed. 252.) The opinion of the commission cited in support of the right of a railroad company to make such a contract (No. 1772, in re Company Material Transportation, 22 I. C. C. Rep. 439) refers to goods transported by the company for its use as a *common carrier*.

Second Point.

THE COMMODITIES CLAUSE IS CONSTITUTIONAL AS APPLIED TO THE TRANSPORTATION BY A RAILROAD, ALSO ENGAGED IN PRODUCTION, OF ARTICLES OWNED BY IT AND INTENDED FOR USE IN ITS OPERATIONS AS A PRODUCER. HENCE IT IS CONSTITUTIONAL AS APPLIED TO THE TRANSPORTATION BY DEFENDANT OF THE HAY IN QUESTION FROM BLACK ROCK (BUFFALO) TO SCRANTON.

I.

It seems to be conceded by defendant that the Commodities Clause declares to be unlawful the transportation by a railroad company of articles owned by it under the circumstances of this case. This, of course, follows from the plain wording of the statute, which declares it to be unlawful for "any railroad company" to transport in interstate commerce "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, *or* which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." Congress must be presumed to have meant what it has plainly said. (*United States* v. *Goldenberg*, 168 U. S. 95, 102; *St. Paul Railway Co.* v. *Phelps*, 137 U. S. 528, 536; *Scott* v. *Reid*, 10 Pet. 524, 527. See also *Encyc. Supreme Court*, vol. 11, p. 111, n. 23.)

Defendant contends, however, that the transportation by a railroad of materials purchased and owned by it and intended for use in its mining operations,

unlike its transportation to market of commodities owned by it, can result in no unlawful discrimination or otherwise inflict any injury upon the public, and consequently that, in so far as it prohibits such transportation, the Commodities Clause has no relation to any useful or public end, but is arbitrary and unreasonable and therefore void under the Fifth Amendment.

II.

The purpose of the Commodities Clause was twofold: To protect shippers from the unlawful discriminations and disadvantages inherent in the ownership by carriers of the property transported by them, and to prevent railroads from monopolizing by means of such discriminations the production and sale of articles transported over their lines.

In *United States* v. *Delaware & Hudson Co.* (213 U. S. 366), this court construed the Commodities Clause as follows (p. 415):

> We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (*a*) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (*b*) *when the carrier owns the article or commodity to be transported in whole or in part;* (*c*) when the carrier at the time of trans-

> portation has an interest, direct or indirect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder. (Italics ours.)

As thus construed the clause was held to be a proper regulation of commerce.

Whilst it is true that in that case the commodity owned by the railroad company was being transported by it to market, it is nevertheless perfectly clear that the purpose of the court was to lay down a general and definitive construction of the statute—in the words of the Chief Justice, to define its significance (p. 405)—as a basis for a judgment as to its constitutionality.

The contention that the clause conflicts with the Fifth Amendment, which is the defense here also, was thus answered (213 U. S., 416):

> We think it unnecessary to consider at length the contentions based upon the due-process clause of the fifth amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the enforcement of the clause interpreted as the Government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience,

> not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that in substance and effect the argument really asserts that the clause as construed by the Government is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappear as a result of the construction which we have given the statute.

We therefore maintain that the Commodities Clause having been construed by this court as embracing unqualifiedly the cases where the carrier "owns the article or commodity to be transported in whole or in part" (except, of course, where the article is for its own use as a carrier), and as so construed having been held constitutional, the question whether it is constitutional as applied to the transportation by a railroad company of commodities owned by it under the circumstances of the present case is *res judicata*.

III.

Assuming the question to be open, however, it is submitted that Congress having determined, not without reason, that evils generally flow from the transportation by a railroad company in interstate commerce of commodities owned by it at the time of transportation, it may prohibit such transportation

broadly, as it has done in the Commodities Clause, and is under no duty nicely to consider whether under some circumstances such transportation might not be innocuous, and, if so, to permit it.

This contention is sustained by a principle of constitutional construction announced in *McCulloch* v. *State of Maryland* (4 Wheat. 316, 421, 423) and ever since adhered to. The principle was thus stated in *Powell* v. *Pennsylvania* (127 U. S. 678, 685):

> The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the Government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, * * * yet "in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment * * * ."

Applying the principle to that case, it was held that the courts would not override the legislative judgment that the protection of the public health required not merely that the manufacture of oleomargarine be so regulated as to exclude noxious ingredients, but prohibited altogether; that the legislature had this choice of means.

In *Otis & Gassman* v. *Parker* (187 U. S. 606, 608, 609), it was held that in order to suppress gambling in corporate stocks the legislature may avoid all contracts for the sale of such stocks on margin, whether

only a settlement of price differences or a *bona fide* acquisition of the stock is contemplated.

Similarly, in *Public Clearing House* v. *Coyne* (194 U. S. 497), it was held that in preventing the use of the postal service in aid of lotteries and fraudulent enterprises Congress is not confined to excluding matter relating to such enterprises but may prohibit the transmission or delivery of *all* matter sent by or addressed to persons participating therein.

In one of the latest cases on the subject, *Purity Extract Co.* v. *Lynch* (226 U. S. 192), it was held that a State legislature, in order to make certainly effective its prohibition of the sale of malt liquor, might include within the prohibition wholly innocuous beverages, Mr. Justice Hughes saying for the court (p. 201):

> It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

Amongst other apposite cases are:

> *The Slaughter House Cases* (16 Wall. 36).
>
> *Knoxville Iron Co.* v. *Harbison* (183 U. S. 13).
>
> *Booth* v. *Illinois* (184 U. S. 425).

Silz v. *Hesterberg* (211 U. S. 31).
Lemieux v. *Young, Trustee* (211 U. S. 489).
Commonwealth v. *Gilbert* (160 Mass. 157).
Opinion of the Justices (163 Mass. 589).

Two recent acts of Congress which proceed on the same principle are: (1) *The Pure Food Act* (34 Stat. 768), which prohibits the sale for food of any animal which "died otherwise than by slaughter," though the animal *might* have been killed in some other manner in no wise affecting its wholesomeness as food; and the *Act to Regulate Radio Communication* (38 Stat. 302), which requires all interstate wireless telephone operations to be carried on under Federal licenses and regulations, though some such operations might be for scientific experiment and purely private.

IV

A further answer to this defense, complete in itself, is that it is based on an erroneous conclusion of fact; that is, the transportation by a railroad company, also engaged in production, of articles owned by it and intended for use in its operations as a producer, is not innocuous, as claimed, but on the contrary leads to like evils and is subject to like abuses as a railroad company's transportation *to market* of commodities owned by it.

The underlying purpose in the enactment of the Commodities Clause was to divorce as far as possible the business of transporting commodities in interstate commerce from the business of producing them for sale in interstate commerce, because the advantages

which a railroad company would have as a producer and shipper over the ordinary producer and shipper would tend very rapidly to give it a monopoly of all forms of production tributary to its line which it chose to engage in, and also because when a railroad company owns commodities which it transports a situation is created where discrimination between producers and shippers is rendered easy and at the same time difficult of detection. As the Interstate Commerce Commission has said (*Cedar Hill &c. Co.* v. *Atchison &c. Ry. Co.* (15 I. C. C., 75, 78):

> So long as there is identity of ownership in the agency of transportation of the thing transported it is extremely difficult, if not impossible, to prevent discrimination between shippers.

If a railroad company engaged also in production may transport to market over its own line a commodity produced in its mines or factories and of which it is still the owner at the time of transportation, it has this crushing advantage over other producers of the same commodity along its line; namely, that it has to pay only the actual cost of transportation in order to get its commodity to market, whereas the other producers have to pay the regular published freight rate of the railroad company which of course in every normal case is substantially greater than the actual cost of transportation.

The disadvantage to the other producers is equally great where the railroad company transports over its line materials purchased by it for use in the opera

tion of its mines or factories. In this case the railroad company is able to produce the commodity at less cost than its competitors. In the other case it is able to distribute the commodity at less cost than its competitors. It makes no difference, however, to the producer who must compete with the railroad company whether the railroad company's advantage was obtained in the final stage of the transportation from the mine or factory to market or in the first stage of the transportation of the raw materials to the mine or factory. In either case the railroad company can undersell its competitors in the market and thereby monopolize the production of the commodity and its sale in interstate commerce.

To illustrate, suppose a railroad company were also engaged in the manufacture of steel. If the contention of the defendant is correct it may transport its ore free of charge from Michigan to Pittsburgh, its coal and coke free of charge from other parts of Pennsylvania to Pittsburgh, its pig iron free of charge to the steel mills, and the nearly finished product to New York City, since at none of these stages would the railroad company be transporting to market a finished product, but only the materials out of which the finished product was to come. Having reached New York, the product may be finished at a plant of the railroad company and then sold in competition with the steel produced by other companies. Of course no other manufacturer desiring to sell in the New York market could meet such competition, since the successive costs of transportation at the published

rates which he must pay and of which the railroad company in large part is relieved, would constitute perhaps the greater part of the final market price.

And so it would be in varying degree throughout the whole range of industry.

In *Swift & Co.* v. *United States* (196 U. S. 375), it was held (p. 402):

> It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

It is equally obvious that it is wholly immaterial whether that advantage comes in the final stages of distribution or in the first stages of production.

But permitting a railroad company to own articles while transporting them for use in its operations as a producer not only enables it to employ its faculty as a carrier to reduce its costs of production to the disadvantage of all other producers along its lines; it also creates a condition where discrimination in rates, service, and facilities, not only in favor of the railroad itself as a producer and shipper, but as between other producers and shippers, is rendered both easy of accomplishment and difficult of detection, just as permitting a railroad to transport to market commodities which it owns creates a condition which invites such discriminations.

The possibility of such discriminations in the case of shipments bound to market is illustrated by the following example which is a slight modification of the facts in the case of *New Haven R. Co.* v. *I. C. C.*

(200 U. S., 361), on which this court so much relied in the first Commodities Clause case:

A railroad company wishes to give one steel company an unfair advantage over others. All have ore to ship from Lake Superior to Pittsburgh. The railroad company buys ore from the steel company it wishes to favor, taking title at the point of shipment (Lake Superior), transports the ore as its own, freight free, to Pittsburgh, and there resells it to the company from which it was purchased, charging less than the price originally paid plus the freight rate from Lake Superior to Pittsburgh. Clearly that would be an unlawful discrimination within the principle of the *New Haven case*.

The defendants, however, would point out that both the instance cited and the *New Haven case* upon which it is based are cases of goods bound to market, since they are to be sold immediately upon arrival at destination, presumably in competition with the goods of others. But suppose that instead of selling the ore at once upon reaching Pittsburgh the railroad company retains title to it until made into pig iron, either smelting the ore itself or employing for that purpose the favored steel company, and then sells the pig iron to such favored company. Is there any doubt but that in this case the payments could be so arranged as to give the favored company the same advantage in the cost of transportation which it had in the other case? What possible difference could it make whether the railroad company sold the ore directly on arrival at Pittsburgh or

retained the title for a week or so during the initial process of manufacture? Yet, reasoning from an attempted distinction between outbound and inbound goods, the defendant would say that the Commodities Clause is constitutional in the one case and unconstitutional in the other—a result palpably absurd. The danger of discrimination is as inherent in the one case as in the other.

V.

The final suggestion of the defendant is in effect that since the result would have been the same if accomplished by another and (as it says) unquestionably lawful method, namely, by having the vendor retain title until the hay arrives at the mines, that therefore the present arrangement is lawful.

The relevancy of this contention is not apparent. The same contention might have been made in the first cases in this court under the Commodities Clause. It is just as easy to defeat the object of the law in respect of outbound commodities by vesting title in the buyer before transportation as it is in respect of inbound goods by keeping title in the seller until the end of transportation.

In *United States* v. *Lehigh Valley R. R. Co.* (220 U. S. 257) this court thus disposed of a similar contention (p. 273):

> Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by that com-

pany would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were but one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case of stock ownership, particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention.

But it is not true that the object of the law could be thus defeated in the case of inbound commodities. The terms of the act apply not only to property which the carrier *owns*, but also to that in which "*it may have any interest, direct or indirect.*" Has not a carrier an interest in goods which it is transporting under an agreement with the shipper that upon arrival at destination it is to become their owner? Indeed, under the doctrine of equitable conversion in the law of wills, it would have an "equitable" interest in the strict sense, and so fall directly within the words of Mr. Chief Justice White in the first *Commodities Clause Case*, where he says that the act applies—

> When the carrier at the time of transportation has an interest, direct or indirect, in a legal *or equitable* sense in the article or commodity

transported * * *. (213 U. S. at 415. Italics ours.)

Again, the method suggested by the defendant at best would be possible only where the commodities were purchased by the railroad company. It would not apply in such a case as that suggested above, where the railroad company mines the ore, mines the coal, and produces the pig iron, all of which are transported not to market to be sold, but to the place of production for use in making the finished steel. Nor would it apply to the many similar instances which might be cited.

Wherefore, it is submitted, the judgment of the District Court should be affirmed.

G. CARROLL TODD,
Assistant to the Attorney General.

OCTOBER, 1913.

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Supreme Court of the United States.

October Term, 1913.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff-in-Error,
against
THE UNITED STATES OF AMERICA,
Defendant-in-Error.

No. 275.

In Error to the District Court of the United States for the Western District of New York.

Brief on Behalf of the Delaware, Lackawanna and Western Railroad Company, Plaintiff-in-Error.

W. S. JENNEY,
Counsel for Plaintiff-in-Error.

APPEAL PRINTING COMPANY, 32-34 VESEY STREET, NEW YORK.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1913.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Plaintiff-in-Error, *against* THE UNITED STATES OF AMERICA, Defendant-in-Error.	No. 275.

BRIEF ON BEHALF OF THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF-IN-ERROR.

Statement of the Case.

This cause comes to this Court upon a writ of error upon a judgment entered on March 19th, 1912, upon the verdict of a jury in the District Court of the United States for the Western District of New York, adjudging plaintiff-in-error guilty of violations of the so-called "Commodities Clause" of the Hepburn Law, passed June 29, 1906, which reads as follows:

> "From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other

> State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier" (34 *Stat.*, 584, 585).

Plaintiff-in-error was indicted upon twenty counts. Each count set forth a separate shipment of one carload of hay transported in interstate commerce by plaintiff-in-error, a common carrier, over its own railroad from Black Rock, New York, to Scranton, Pennsylvania, during the period from September first to December first, 1909, which hay, it was alleged, was owned by plaintiff-in-error during the transportation thereof, and was not necessary or intended for its use in the conduct of its business as a common carrier (Record, pp. 4-18).

Plaintiff-in-error pleaded not guilty to the indictment, and the case was tried to a jury, which rendered a verdict of guilty on all twenty counts. Plaintiff-in-error was sentenced to pay a fine of one hundred dollars on each of the twenty counts, making a total of two thousand dollars; and judgment was entered accordingly (Record, pp. 19-20).

Plaintiff-in-error then sued out a writ of error in this Court, the constitutionality of a law of the United States having been drawn in question in the Court below (Record, pp. 25-26, 34, 36). On motion of the Government the case was advanced for hearing.

Statement of the Facts.

On August 21st, 1909, the plaintiff-in-error (hereinafter called the "Railroad Company"), entered

into a written contract (Exhibit 1, Record, p. 37), with the Vassar Hay and Produce Company, whereby said Vassar Hay Company agreed to sell and deliver to the Railroad Company, f. o. b. on the tracks of the Railroad Company at Buffalo, New York, 3,000 tons of hay, and the Railroad Company agreed to pay therefor $15.40 per ton f. o. b. Buffalo upon the acceptance of the hay after an inspection thereof at the points on its railroad to which it might choose to transport the hay from Buffalo.

Pursuant to said contract the Vassar Hay Company shipped from Millington, Michigan, via the Michigan Central Railroad Company, twenty carloads of hay (the subject of said indictment), consigned to "G. P. Wilson" (the purchasing agent of the D. L. & W. R. R. Co.), "c/o C. J. Newcomer," (said Railroad Company's local Buffalo freight agent), "Buffalo, N. Y., c/o D. L. & W.," which were delivered by the Michigan Central to The Delaware, Lackawanna and Western Railroad Company on its tracks at Black Rock (which is a part of Buffalo), during the period from September 1st to December 1st, 1909. The hay was thereupon reconsigned and transported by The Delaware, Lackawanna and Western Railroad Company over its rails from Black Rock to the coal mines of said Railroad Company at or near Scranton, Pennsylvania, where it was to be used. Upon its arrival at said mines it was inspected by the Railroad Company's Inspector; and having been found to be of the quality called for by the contract, it was, pursuant to said contract, accepted by the Railroad Company and paid for (Record, pp. 21-24; Exhibits "3," "4" and "5").

The freight charges for the transportation of said hay were paid in accordance with said contract of

purchase, as follows: the Vassar Hay Company paid to the Michigan Central Railroad Company its proportion accruing up to Black Rock, of the through rate from Millington, the point of shipment, to the mines at or near Scranton, the point of destination; The Delaware, Lackawanna and Western Railroad Company assumed and bore the proportion of said through rate, accruing from Black Rock to said point of destination (Record, pp. 21, 22; Exhibit "2"). This division and payment of the freight charges was strictly in accordance with decisions and administrative rulings of the Interstate Commerce Commission, as will hereinafter more fully appear.

The hay was intended for use and was in fact used by the Railroad Company in the operation of certain of its coal mines at or near Scranton, Pennsylvania, having been fed to the mules used in hauling coal in the mines and to the horses used in outside operations (Record, p. 23).

The Delaware, Lackawanna and Western Railroad Company is a corporation of the State of Pennsylvania, engaged in the business of operating a railroad, partly owned and partly leased by it, extending from Buffalo, New York, through the States of New York, Pennsylvania and New Jersey, to Hoboken, New Jersey, with branch lines in each of said States, and also in the business of operating anthracite coal mines, owned and leased by it, in the State of Pennsylvania (Record, pp. 26-27).

At the foundation of its corporate structure lie two Acts of the General Assembly of Pennsylvania; one approved April 7th, 1832, providing for the incorporation of the Liggett's Gap Railroad Company, and authorizing said company to construct a railroad from a point in Cobb's Gap, near Scran-

tion, "to a point on the New York State line in Susquehanna County, passing through the coal region on the Lackawanna and Liggett's Gap;" the other approved April 7th, 1849, providing for the incorporation of the Delaware and Cobb's Gap Railroad Company, and authorizing said company to construct a railroad beginning at the Delaware River near Water Gap, thence by a "practicable route, terminating at or near Cobb's Gap in the County of Luzerne or Wayne." In 1853 said two companies were consolidated, the consolidation assuming the name of "The Delaware, Lackawanna and Western Railroad Company." By various other special Acts of the Pennsylvania Legislature, there were conferred upon said Railroad Company additional rights, powers, privileges and franchises, among which Acts were one approved April 14th, 1851, authorizing it to hold coal lands, and another approved March 22nd, 1855, authorizing it to hold coal lands and "to mine, purchase, transport and vend coal." By authority of other special Acts of the Pennsylvania Legislature there were merged into The Delaware, Lackawanna and Western Railroad Company between 1832 and 1870, various coal and railroad companies, chartered by the State of Pennsylvania. All of said merged companies were by their charters expressly authorized to purchase and hold large tracts of coal lands, and to mine and vend coal. Each of said merged companies had, pursuant to such charter powers, acquired large tracts of coal lands, which vested in The Delaware, Lackawanna and Western Railroad Company upon such mergers, as did likewise all the charter powers, rights, privileges and franchises of each of said merged companies (Record, pp. 27-32).

Pursuant to the authority of said Acts of the General Assembly of Pennsylvania, The Delaware, Lackawanna and Western Railroad Company lawfully owns in fee and leases, and since a great many years prior to June 29th, 1906 (the date of the passage of the Hepburn Act), has owned and leased extensive tracts of coal lands in Pennsylvania, from which it has been and is now lawfully engaged in mining anthracite coal (Record, pp. 27, 32). Of the coal mined from said lands, from 25 to 30 per cent., is what is known as "steam sizes," the smaller sizes, and this coal is and has been used by the Railroad Company in the operation of its railroad and its mines; the remainder, from 70 to 75 per cent. of the total, known as "prepared sizes," the larger sizes, is and has been sold by the Railroad Company, and since the 2nd day of August, 1909, has been sold and delivered at the mouth of the mines to The Delaware, Lackawanna and Western Coal Company, a New Jersey corporation (Record, pp. 23-24).

It was in the operation of certain of the mines, so owned and operated by the Railroad Company, that the hay in question was used (Record, p. 23).

The railroad of The Delaware, Lackawanna and Western Railroad Company is the only railroad that reaches any of the mines or collieries owned and operated by said Railroad Company, except one, the Manville colliery, all of said collieries, except the Manville colliery, being distant from any other railroad by from three to eight miles (Record, p. 32).

The Assignments of Error.

(Record, pp. 45-48.)

The errors relied upon in this Court are:

First. That the Court erred in denying defendant's motion made at the close of the Government's case (Record, p. 25), and again at the close of the whole case (Record, p. 34), to dismiss the indictment and to direct a verdict of not guilty upon the ground that the hay mentioned in the indictment was not owned by the defendant during the transportation thereof over its railroad between Black Rock and Scranton as set forth in the indictment; and in charging the jury in the following words (Record, p. 34), to wit: "The thing which was transported, that is, the hay, must be owned by the railroad company which transports it. As you doubtless noticed, there is a difference of opinion on this subject, but for the present you will be guided by my opinion, which is that under this contract in writing, the railroad company did own this hay, when it transported the hay from Buffalo to Scranton" (First, Seventh and Fifteenth Assignments of Error).

The indictment in each of its twenty counts alleged the transportation by the defendant of hay *"of which it was the sole owner."* It was therefore essential to the Government's case (as the Trial Court stated in its charge to the jury, Record, p. 34), that it should establish that the hay was owned by the Railroad Company during the transportation thereof from Black Rock to Scranton. The proof must conform to the indictment. (United States *v.* Hardyman, 13 Pet., 176.) The proposition to which our argument will be

addressesd under these assignments of error, therefore, is that the hay was not owned by the Railroad Company during the transportation thereof from Black Rock to Scranton; in other words, that under the contract of purchase the title to the hay passed to the Railroad Company, not at Black Rock but at the mines at or near Scranton, upon acceptance after inspection.

Second. That the Court erred in denying defendant's motion made at the close of the Government's case (Record, pp. 25-26), and again at the close of the whole case (Record, p. 34), to dismiss the indictment and to direct a verdict of not guilty, and in denying defendant's motion for an arrest of judgment (Record, p. 36), all of which were made upon the ground that the said statute, known as the "Commodities Clause" in so far as it prohibited the transportation by the defendant of the hay in question, was unconstitutional because it deprived the defendant of its liberty and property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States (Fifth, Sixth, Eleventh, Twelfth and Thirteenth Assignments of Error).

The proposition to which our argument will be addressed under these assignments of error, therefore, is that, assuming the hay to have been owned by the Railroad Company during the transportation thereof from Black Rock to Scranton, the Commodities Clause in so far as it prohibited the transportation of such hay by the Railroad Company under the circumstances of this case, violated the Fifth Amendment to the Constitution of the United States as above stated.

FIRST POINT.

The hay in question was not owned by the Railroad Company during the transportation thereof from Black Rock to Scranton. The title to said hay did not pass to the Railroad Company until it accepted the hay after an inspection thereof at the mines.

I.

The necessity of acceptance of goods by a buyer to transfer the title.

It is a fundamental principle, applicable, so far as we are able to determine from a study of the text books and the cases, to every contract for the sale of goods, that the title to the goods does not pass to the buyer until he accepts the specific goods. This acceptance by the buyer may be express or implied. It may occur before or after the delivery of the goods to him. But in one form or the other, express or implied, before or after delivery, it must always occur before the title passes. In the very nature of the case the title cannot pass until the minds of the parties meet upon the specific goods to be made the subject of the contract of sale.

> "The proper meaning of 'acceptance' in the law of sales is an assent to become owner of specific goods offered by the seller. This meaning has been departed from in England in cases relating to the Statute of Frauds, but in the United States both under the Statute of Frauds and in the matter of what constitutes performance of the contract, this is the prevailing meaning. It is the meaning of the word in the Sales Act. Acceptance has nothing to do with possession or delivery, for acceptance may precede delivery, and on the

other hand delivery may take place without acceptance. For the purpose of satisfying the Statute of Frauds, acceptance cannot be made by the agency of the seller, but aside from the Statute of Frauds the buyer may accept in advance such goods as the seller may appropriate. But this, because of the buyer's right of inspection, will not debar him from rejecting the goods if not in conformity with the contract when they come under his personal observation unless he waives his right. Much confusion has been caused in the law of some states by the assumption that acceptance of the goods means not only an assent to become owner of them, but also an agreement that the goods thus received fulfill in every respect the legal obligation of the seller. No such implication, however, is necessarily contained in the word 'acceptance'" (*Williston on Sales*, Section 482).

"Acceptance in the case of executory contracts for the sale of unascertained goods involves an element of great importance, no longer open in the case of the present sale of a specific chattel. At the time of making the executory contract no title to any specific chattel passes thereby, for the reason that the chattel has not yet been ascertained. It remains, as has been seen, for the seller, on his part, to appropriate a chattel to the contract, and for the buyer to assent to that appropriation. Resolved into its elements, this transaction will be found to involve four elements of importance: Appropriation of the chattel and its delivery, by the seller; assent to that appropriation and the receipt of the chattel, by the purchaser. Appropriation and delivery by the seller have already been considered; assent to the appropriation and the receipt of the goods by the buyer remain to be considered. Taken together they constitute the duty of the buyer.

"Performance by the buyer, therefore, in its

fullest form, is clearly in these cases an act involving two distinct elements—mental assent and physical reception. Either may exist without the other. The buyer may assent that the goods selected by the seller are the goods to which the contract is to attach—which *satisfy* the contract and the title to which is therefore to vest in him—without actually receiving them into his possession. On the other hand, he may actually receive possession of certain goods without assenting that they are the ones contemplated by the contract. To the former act alone the term 'acceptance' is properly applied." (*Mechem on Sales*, Sections 1369, 1370.)

"It must be borne in mind, however, that ordinarily the question of acceptance does not arise when the property in the goods has passed to the buyer. For if the seller, having authority to appropriate the goods, has duly pursued that authority by appropriating goods according to the contract, *the buyer is deemed to have already accepted the goods which have thus become his*, but in exceptional cases the buyer may have under a condition subsequent, express or inferred from the circumstances, a right of subsequently rejecting goods which have become his property." (*Benjamin on Sales*, 5th Ed., by Kerr, page 748.)

A large number of cases wil be found cited in support of this general proposition in 35 Cyc., page 306, among others, the following:

Hershiser *v.* Delone, 24 Nebr., 380, 38 N. W., 863.

Stephens *v.* Santee, 49 N. Y., 35.

Kein *v.* Tupper, 52 N. Y., 550.

Cooke *v.* Millard, 65 N. Y., 352.

Nichols *v.* Paulson, 6. N. Dak., 400, 71 N. W., 136.

Hathaway *v.* O'Gorman Co., 26 R. I., 476, 59 Atl., 397.

Smith *v.* Wisconsin Co., 114 Wis., 151, 89 N. W., 829.

II.

The case of a contract for the sale of unascertained goods. The doctrine of subsequent appropriation.

Where there is a contract to sell unascertained goods, no property in the goods is transferred to the buyer until the goods are ascertained (except in the case of a contract to sell an undivided share of goods). This rule is incorporated in Section 17 of the Sales Act; and as stated in Williston on Sales, Section 258: "As to this rule there can be no question. It is a rule rather of logic than of law that transfer of ownership cannot be predicated of unascertained property."

The ascertainment of the goods involves an appropriation to the contract of specific goods—subsequent appropriation, as it is generally called. This appropriation may be made by the seller with the assent of the buyer, or by the buyer with the assent of the seller. In either case such assent may be express or implied, and given in advance of or subsequent to the act of appropriation. *But in every case the appropriation must have the assent of both parties, to transfer the property in the goods.*

Subsequent appropriation by the seller, to which the buyer has assented in advance, may be illustrated by the case where the seller delivers goods to a carrier, *for account of the buyer*, for transportation to the buyer. The theory on which the property in the goods is held to pass to the buyer in such a case upon the delivery of the goods to the carrier, is that the buyer is presumed (unless a

contrary intention appears), to have expressly or impliedly authorized the seller to deliver the goods to the carrier for account of the buyer, and to have thereby assented in advance to an appropriation of the goods by the seller by the delivery of them to the carrier pursuant to the buyer's authority. In order that the title shall pass, however, it is essential that the seller act in conformity with the authority given to him by the buyer.

These propositions have been incorporated in Section 19, Rule 4 (1), (2), of the Uniform Sales Act. It seems sufficient to submit as authority for them, the following references to the text books, without citing any of the many cases in which they have been recognized and applied.

Williston on Sales, Sections 274, 277, 278.
Mechem on Sales, Sections 721, 724, 726, 729, 730.
Blackburn on Sales, page 129.
Benjamin on Sales, 5th Ed., pp. 341, 346, 347.

III.

When the contract requires the seller to deliver the goods to the buyer.

When the seller is required by the contract to deliver the goods to the buyer at some particular place, the presumption is (unless a contrary intention appears), that the property in the goods does not pass until the goods are delivered to the buyer at that place, and accepted by him. For example, if the seller agrees to deliver goods to the buyer f. o. b. at some distant place, and in the performance of that obligation delivers the goods to a carrier to be transported to such place and

there delivered to the buyer, the property in the goods presumably will not pass until the goods are delivered to the buyer at their destination and accepted by him.

In such a case there is no implication of any authority from the buyer to the seller to make an appropriation of goods to the contract, for account of the buyer, prior to delivery to the buyer at the place specified, or of assent by the buyer to an appropriation made by the seller prior to that time. In this respect the case is to be distinguished from that last above stated, where the seller delivers goods to a carrier *for account of the buyer* and the passing of title at that time is predicated upon an implied authority given by the buyer to the seller to make a final appropriation of the goods by such delivery.

This rule is stated in Section 19, Rule 5, of the Uniform Sales Act. See:

Williston on Sales, Section 280.
Mechem on Sales, Sections 733, 736.
Benjamin on Sales, 5th Ed., page 355.
Braddock Glass Co. *v.* Irwin, 153 Pa., 440, 25 Atl. Rep., 490.
Dannemiller *v.* Kirkpatrick, 201 Pa., 218, 50 Atl. Rep., 928.
McNeal *v.* Braun, 53 N. J. L., 617, 23 Atl. Rep., 687.
Neimeyer Lumber Co. *v.* Burlington R. R. Co., 74 N. W. (Neb.), 670.
United States *v.* Andrews, 207 U. S., 229.

We have stated that where the seller is obligated to deliver the goods to the buyer, the property in them presumably does not pass until the goods are delivered to the buyer, *and accepted by him.*

As we have already shown, acceptance of the specific goods by the buyer is always essential to transfer the property in them. And since under the rule we are now considering, the implication of an acceptance by the buyer prior to the delivery of the goods to him, is excluded by the presumption upon which the rule is based, that the seller has no implied authority from the buyer to appropriate the goods to the contract for account of the buyer, short of a delivery of them to the buyer, it is to be presumed from the very nature of the case, that the acceptance of the goods by the buyer is not to take place until the delivery of the goods to him.

An acceptance of the goods which will pass the property in them, is to be distinguished from mere physical possession of them by the buyer. When the goods are delivered directly to the buyer, he is entitled to inspect the goods before acceptance and for the purpose of such inspection may take possession of them without thereby acquiring the property in them. The passing of the title depends on an acceptance, a consent to become the owner of the goods, after inspection has been completed or waived.

These propositions are discussed by Williston, as follows:

> "Sec. 472.—Where by the terms of the contract the property is not to pass until the goods are delivered to the buyer, the word 'delivered' used in regard to the action of the seller connotes an assent to take on the part of the buyer. In other words, delivery when made directly from one party to the other requires assent to take as well as assent to give. Accordingly, the buyer, by refusing to take the goods, can always prevent

delivery and thereby, where the property is not to pass until delivery, prevent it from passing. For this purpose it is quite immaterial why the buyer refuses to take the goods, or whether his reason is a just one. The situation must be distinguished from cases where the buyer has given authority to the seller to appropriate goods for him or deliver them to a third person for him. In such cases the previous assent of the buyer to this mode of dealing with the goods effects a transfer of the property when the seller carries out the authority given him. It might be urged that where the contract provides for the direct delivery of the goods to the buyer, there also the seller is given an authority, and the mere unloading them at the buyer's place of business would operate as a transfer of the property. But presumably because of the case of getting the immediate assent or dissent of the buyer in such a case, the law implies no authority on the part of the seller to transfer the property by the mere surrender of the goods at a place where they will be in the buyer's control. *Nor does the mere assent of the buyer to take the goods into his physical control operate as a transfer of the property. He is entitled to examine the goods in order to decide whether he will become owner, and until the examination is completed or waived, the property will not pass.*" * * *

In the case of Star Brewing Company against Horst, 120 Fed. Rep., 246, it appeared that Horst Bros., agreed to sell and deliver to the brewing company, f. o. b. cars at Belleville, Ill., 12,000 pounds of hops, of a certain quality. Horst Bros. shipped the hops and when the car containing them arrived at Belleville the railroad company placed it on the brewing company's side-track.

The brewing company inspected the hops and refused to accept them on the ground that they were not of the required quality. Horst Bros. sued to recover the contract price, and the jury rendered a verdict for the plaintiffs. The Circuit Court of Appeals reversed the judgment and in its opinion said:

> "The evidence warranted the jury in finding that the hops were of proper quality and that the brewery company's refusal to accept them was prompted by a great decline in the market price. * * * Treating the freight as prepaid and the brewery company's refusal to accept as perverse, there remains the question of Horst Bros.' right to recover for goods sold and delivered. The parties had the right to make a contract which would require the brewery company to accept Horst Bros.' selection of choice California hops and to pay within 10 days after the arrival of the car at Belleville. But the contract they entered into in 1890 bound Horst Bros. to an agreement to sell and deliver in 1895 an article which would have no existence until then, and bound the brewery company to an agreement to purchase, receive, and pay for that article. This was not a sale. The minds of the parties had never met on a specific, identified thing as the object of barter. Their minds could not meet until Horst Bros. had made an appropriation of a specific, identified thing as a fulfillment of the contract in that respect, and until the brewery company had accepted or acquiesced in that appropriation. Under this contract, neither Horst Bros. nor any third party was authorized to make a binding selection and appropriation for the brewery company. The brewery company never consented to the appropriation. That it should have done so is of no consequence in

this action for the price of goods sold and delivered. If a party purchases, he may be held to pay for the thing. If he agrees to purchase and refuses, the remedy is for breach of the contract to purchase."

In the case of McNeal *v.* Braun, 53 N. J. L., 617, 23 Atl. Rep., 687, a barge loaded with coal had been ordered to be delivered at Burlington, the buyer's residence. The barge arrived and the buyer directed that it be placed along side of his wharf for unloading. This was done and the barge made fast to the wharf. The buyer's servants then prepared to unload the coal. Preparations were made and a small quantity of the coal was actually unloaded. The workmen then quit work for the day and during the night the barge sank. The Court held that the loss fell upon the seller, because the buyer "was entitled to a reasonable opportunity to unload the entire cargo for examination, to ascertain whether or not the coal corresponded with his order and had arrived in good condition."

In the case of Holmes *v.* Gregg, 66 N. H., 621, 28 Atl. Rep., 17, the Court held that the buyer was entitled to unload for inspection, lumber from box cars in which it had been shipped without being chargeable as having accepted the lumber.

The place of inspection and of acceptance is *prima facie* the place where the goods are delivered to the buyer. But this is merely a rule of presumption, and there seems to be no reason in the nature of things why the parties cannot expressly agree that the inspection and acceptance shall take place at some later time or different place than that of delivery. Indeed, the place of

delivery may be so unsuitable or inconvenient for inspection that even in the absence of an express agreement the parties will be presumed as a matter of law to have intended some later time or different place for inspection and acceptance, than the time and place of delivery.

> "The buyer's opportunity of inspection *prima facie* arises at the place of delivery; but it need not necessarily be the place of delivery, for the contract may expressly or by implication provide that the time for inspection shall be subsequent to delivery, and the place of inspection different from that of delivery" (*Benjamin on Sales*, 5th Ed., p. 753).

> "The place of inspection is *prima facie* the place where the goods are delivered to the buyer. The contract may, however, provide for inspection at some other place, and the nature of the contract may be such that even in the absence of express provision the law will hold some other place than that of delivery to be the point for inspection. The chief ground for such an implication seems to be that a reasonable examination cannot readily be made at the place of delivery" (*Williston on Sales*, Section 480).

See the cases discussed under Subdivision V following.

IV.

The contract in this case considered in the light of the foregoing rules.

The provisions of the contract important to be considered in this connection, are as follows:

> "First. The vendor agrees to sell and deliver to the purchaser, f. o. b. on the tracks

of The Delaware, Lackawanna and Western Railroad Company, at Buffalo, New York, three thousand (3,000) tons (of 2,000 pounds each) of No. 1 Timothy Hay of the standard required by the National Association, in bales, on terms and according to the provisions hereinafter set forth.

* * * * * *

"Third. The purchaser agrees to pay to the vendor for all hay delivered to it hereunder, as hereinbefore provided, fifteen dollars and forty cents ($15.40) per ton f. o. b. Buffalo, N. Y.

"Payments for the hay shall be made as follows, viz.:

"Upon the delivery of the hay to the purchaser at Buffalo, New York, the same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect said hay before acceptance; and if upon such inspection the said hay shall prove to be of the kind and quality hereinbefore specified, and shall conform in all respects to the requirements of this contract, the purchaser shall accept said hay and pay for the same within 30 days after such acceptance."

The hay in question was delivered by the Vassar Hay Company to the Michigan Central Railroad Company at Millington, Michigan, for transportation to Buffalo (Black Rock), and delivery at that point to The Delaware, Lackawanna and Western Railroad Company. It was received by The Delaware, Lackawanna and Western Railroad Company from the Michigan Central at Buffalo, and thence transported over the railroad of The Delaware, Lackawanna and Western Railroad Company to its mines at or near Scranton, Pennsylvania. It

was there inspected, and then accepted, and paid for upon the basis of such inspection. The transportation of the hay to the mines and the inspection of it at that point were in accordance with the customary course of procedure of the Railroad Company in the handling of hay on its receipt from outside points (Record, pp. 21-23). The freight charges up to Buffalo were paid to the Michigan Central Railroad Company by The Delaware, Lackawanna and Western Railroad Company in the first instance, but in paying for the hay the Railroad Company deducted the amount of such freight charges from the invoice price (Exhibit 2, Record, p. 40). The Railroad Company assumed the freight charges from Buffalo to the mines.

It is clear that the contract was an executory contract to sell unascertained goods, which were to be delivered by the seller, free of freight charges, to the buyer on its tracks at Buffalo, New York.

The property in the hay did not pass to the Railroad Company when the contract was made, because the goods were not then ascertained.

The property did not pass to the Railroad Company when the hay was delivered by the seller to The Michigan Central Railroad Company because the seller's obligation was to deliver the hay, free of freight charges, to the Railroad Company on its tracks at Buffalo, New York.

The property did pass to the Railroad Company when the hay was delivered to and accepted by the Railroad Company (Subdivision III, *supra*). The hay was delivered to the Railroad Company at Buffalo, New York. When and where was it accepted by the Railroad Company? The answer to this question will determine when and where the property in the hay passed to the Railroad Company.

We have already shown that it is not necessary that the acceptance should occur at the time and place of delivery. And this will further appear from the cases hereinafter discussed. The parties may expressly agree, or the time or place of delivery may be such as to raise a presumption, as a matter of law, that the acceptance is to occur at a later time or a different place. The buyer may take physical possession of the goods without thereby accepting them in the sense of assenting to become the owner of them. The intention of the parties is the determining factor, and that intention is to be gathered when possible from the language of the contract. In United States *v.* Woodruff, 89 U. S., 180, the Court said: "It is doubtless true that whether the property passes or not is dependent upon the intention of the parties to the contract, and that intention must be gathered from the language of the instrument."

We submit that in this case the time and place where the parties intended the acceptance of the hay by the Railroad Company to occur, and where it did in fact occur, was after inspection at the mines of the Railroad Company, because:

First. The contract expressly provided that the acceptance should take place after inspection at that point. Article "Third" of the contract reads: "Upon the delivery of the hay to the purchaser at Buffalo, N. Y., the same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect said hay *before acceptance;* and if upon such inspection the said hay shall prove to be of the kind and quality hereinbefore specified and shall conform in

all respects to the requirements of this contract, *the purchaser shall accept* said hay and pay for the the same within 30 days *after such acceptance.*" The "various points on its line of railroad" which were determined upon by the Railroad Company for the inspection and acceptance of the hay, were the mines where it was customary for the Railroad Company to inspect hay coming to it from outside points (Record, pp. 22-23). The contract is, not expressed in the terms of a condition subsequent, operating to give the Railroad Company the right, subsequent to acceptance, to reject the hay if it should prove on inspection at the mines not to conform to the requirements of the contract. It was expressly agreed that the acceptance itself should take place after the inspection at the mines.

Second. Apart from the express agreement in the contract, it is natural that the parties should have intended that the hay should be inspected and accepted at the mines rather than at Buffalo, the place of delivery. The Railroad Company had no facilities for a proper inspection of hay in carloads on its tracks at a terminal like Buffalo. Its inspectors were located at the mines. It was customary for it to inspect such hay at the mines. It is to be presumed that the parties contracted with reference to these facts and the customary practice of the Railroad Company, and intended what they expressly stated in the contract, that the hay should be inspected and accepted at the mines.

The fact that the Railroad Company assumed the freight charges from Buffalo to the mines and carried the hay on a local waybill, reading "Free Company Use," does not militate against this conclusion. The Railroad Company, as purchaser of the

hay, had a right to assume by its contract of purchase, any part of the freight charges from the point of shipment to ultimate destination, regardless of where the ownership of the hay rested during such transportation. It did assume the freight charges from Buffalo to the mines on hay which should be accepted at the mines (The Hay Co. agreed by Article "Sixth" of the contract to pay all freight and other charges on hay rejected); and the legality of its action in so doing did not depend on its owning the hay during the transportation between those points. The words "Free Company Use" on the waybill had no reference to ownership. They were merely intended to inform local agents of the reason for the non-assessment of freight charges, namely, that the Railroad Company was assuming the freight charges because the hay was intended for Company use if accepted. This practice in respect to freight charges has been approved by the Interstate Commerce Commission in several rulings and decisions. In an opinion No. 1772, In the Matter of Company Material Transportation, decided February 13, 1912, and published in the Traffic World and Traffic Bulletin, issue of February 24, 1912, the Commission said:

> "On November 13, 1908, Rule 225, we decided that under the law a carrier, or a person or corporation operating a railroad or other transportation line, may not, as a shipper over the lines of another carrier, be given any preference in the application of tariff rates on interstate shipments, but it may lawfully and properly take advantage of legal tariff joint rates, applying to a convenient junction or other point on its own line, provided such shipments are consigned through to such point from point of origin and are, in good faith,

sent to such billed destination. In this ruling we said:

"'When the carrier is the consignee of a shipment of its own property which moves under a joint rate, and is to participate in the haul of same via its own line, routing instructions of consignor to a specified junction point on the line of consignee-carrier must be observed.'

"The words 'of its own property' were not there used with reference to the technical or actual ownership of the property during transportation; they were intended to refer to property actually owned by the carrier, or in good faith purchased or contracted for for its own use. * * *

"A carrier as a shipper over the lines of another carrier may not have any preference in the application of transportation rates and charges. Conversely, it may have the same privileges under the tariffs as any other shipper. Firms and individuals have an undoubted right to enter into contracts of purchase and sale under which the consignor pays an agreed portion of the transportation charges and the purchaser or consignee another portion of those charges. A carrier as a shipper has the same right. Under the law and the long-established custom a carrier has the right to require prepayment of its charges, or to transport the freight and collect all of such charges on delivery thereof, or to accept part of the charges in prepayment and collect the remainder upon delivery.

"The contract of purchase and sale of the property shipped and the actual or technical ownership of it at the time it is shipped or during the transportation are not matters of importance or concern, so long as such contracts and ownership are not resorted to or permitted to be cloaks or excuses for effecting, either directly or indirectly, evasion of or departure from lawful tariff rates, rules and charges."

V.

Cases in point.

Cornell v. Clark, 104 N. Y., 451:

One Munson agreed to deliver to the railroad company at certain specified points on its right of way, 20,000 ties. The railroad company agreed to pay "55 cents each for first-class ties and 35 cents each for what shall be adjudged second-class ties, to be inspected and counted" by an inspector agreed upon by the parties. The company also agreed to advance 15 cents apiece for ties as they were delivered, "the remainder to be paid on or about the time the ties were taken and used." Under this contract Munson delivered ties on the railroad company's right of way. The ties were counted and the count delivered to an agent of the railroad company, and the company upon his audit advanced the 15 cents apiece as provided in the contract. The ties were never inspected under the contract or divided into classes, and the company never paid anything beyond the advance payment. The ties were delivered during the years 1872 and 1873, and in 1874 the railroad company ceased operations. In 1875 the vendor having failed to obtain payment of the balance unpaid from the railroad company, sold the ties to one Cornell, the plaintiff. The ties remained where they were originally piled until 1879, when they were removed by plaintiff; and while in his possession they were levied upon by defendant, as Sheriff, under an execution on a judgment rendered in 1873 against the railroad company. The Court held that title never passed to the railroad company. We quote from the opinion the following:

"It is plain that no title to the ties which were the subject of the contract between Munson and the Delhi and Middletown Railroad Company, passed to the company on the execution of the contract of December 20, 1871. The contract was then wholly executory. It is inferable from the evidence, that, at the date of the contract, the ties were for the most part uncut on the lands of Munson.

"No part of the purchase-money had been paid, and by the terms of the contract no payment was to be made until the ties were delivered at the point designated. It is clear that no title *in præsenti* passed, or was intended to pass on the execution of the contract. This, however, is not decisive of the question in controversy. The decision turns upon the point whether there was a delivery of the ties in such sense as to vest the title in the railroad company. It is competent for parties to an executory contract for the sale of personal property, to provide in their agreement where and on what event the title shall vest in the vendee. If there is no express agreement on the subject, the question is to be solved by considering all the terms of the contract in connection with the acts of the parties, and applying thereto the rules of law applicable to the case. There is no express provision in the contract of December 20, 1871, upon the subject. It is insisted, however, that the contract provides for a delivery of the ties on the lands of the company, and that a delivery having been made pursuant to the contract that act was decisive on the question of title. It is doubtless true that the delivery of personal property to the vendee, under an executory contract of sale, is an important and often a controlling fact on the question of title. Where the delivery is absolute it furnishes the strongest evidence of an intent to pass the title. The voluntary sur-

render, by the vendor, of all dominion over the property is, as a general rule, inconsistent with the idea that the title is retained by the vendor. But if the delivery is for a special purpose, as where the property is put into the custody of the vendee to meet some term of the contract not inconsistent with the retention of title by the vendor, such a qualified delivery will not pass the title contrary to the intention. In looking at the contract of December 20, 1871, it is, we think, apparent that it was not contemplated that the title to the ties should pass, on the ties being deposited on the lands of the railroad company. The delivery provided for was for the purpose of inspection and selection. The payment to be made at that time was *an advance*, and the advance was to be made when the ties were deposited at the points designated. The company, by the contract, were to pay fifty-five cents each for first-class ties, and thirty-five cents each for what 'shall be adjudged' second-class ties, upon inspection pursuant to the terms of the contract. The company was not bound to take all the ties which might be delivered by the vendor, upon the lands of the company, upon which an advance might be made. It contracted to take only first and second-class ties, according to the inspection of the person designated, or to be designated, as provided by the contract, who, in respect to this duty, was constituted the agent of both parties. The power of rejection was involved in the power of selection. The inspector might reject unmerchantable ties not coming within either of the classes mentioned. It could not be known until the inspection had been had and a separation made what part of the ties should be taken, or what number should be paid for, or what sum beyond the advance payment the company was bound to pay, or the vendors entitled to receive. It was not contemplated that there should be an

inspection for the purpose of ascertaining the quality of the ties when the advance payment was made. The company could safely advance the fifteen cents on the whole number of ties deposited, but the final payment was to be made 'when the ties were taken and used,' and when the number and quality of the ties to be taken were ascertained by inspection, the 'remainder' of the purchase-money would be known. The case is within the general principle that where anything remains to be done to ascertain and identify the subject of the sale, the title does not pass. What was left to be done was not simply to determine by count or by division of the whole number of ties into two classes, the amount remaining unpaid, but it involved identification and specification also. The case is unlike *Burrows* v. *Whitaker* (71 N. Y., 291). In that case the vendee was to take all the lumber delivered, irrespective of selection. Nothing remained to be done except its separation into classes. In this case the company was bound to take only such part of the ties as should be adjudged by the inspector to be first or second-class ties."

In this case, as in the case at bar, the property was delivered into the possession of the buyer; the buyer had the right of inspection to determine whether or not the property delivered conformed to the requirements of the contract; and the buyer had the right to reject property that proved on such inspection not to conform to the requirements of the contract. Although the property remained in the possession of the buyer from six to seven years without an inspection, whereas in the case at bar the property was promptly inspected by the Railroad Company at the mines, and although there was no express agreement in the contract, as there was in the case at bar, that the property should be

accepted by the buyer after inspection, the Court nevertheless held that the title did not pass, because there had not been an inspection and acceptance by the buyer.

Ballantyne v. *Appleton*, 82 Me., 570, 20 Atl. Rep., 235:

The contract between the parties read as follows: "For the consideration hereafter stipulated to be paid by party of the first part, the said H. F. Ballantyne, party of the second part, agrees to furnish and deliver on the company's land, at mill in Lincoln, one hundred and twenty five cords peeled green poplar wood, to be cut four feet long from point to scarf, and generally cleft; to be sound and merchantable; to contain no logs unsplit larger than seven inches in diameter, and no sticks larger than seven by eight inches; no small wood less than three inches in diameter, when peeled. All to be delivered by the first day of May next. Said wood to be well peeled, knotted, cleaned, and fitted for the chipper, and to be well piled, bottom tiers to be protected. Said wood shall be surveyed by some competent surveyor, when so peeled, to be appointed and paid by said company. And it is further agreed that a deduction shall be made in the survey for wood cut short, and for decayed, crooked, and small wood. And the party of the first part agrees to pay therefor at the rate of four dollars ($4.00) per cord when said wood shall be delivered and surveyed as aforesaid." Pursuant to this contract plaintiff commenced in December to haul the wood and as he hauled it, piled it upon the lands of the company at a point designated by the company's agent. In January the company became insolvent, and when the plaintiff learned of this fact he went to the

company's office and informed its agent that he did not wish to have the wood scaled and that he claimed it as his. To that the agent replied, "All right." The wood hauled was never scaled by any surveyor; nothing was paid for it, and no part of it used by the company. The defendant took the wood and sold it, as the assignee in insolvency of the company. The issue in the case was whether the title to the wood passed to the company or remained in the plaintiff. The Court held that title remained in the plaintiff, and said:

> "Upon these facts we think the title did not pass to the company under the contract between the parties. The general rule of law applicable to cases like this is:
>
> "'Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' *Benj., Sales*, Bk. 2, c. 3, Section 360; *Houdlette* v. *Tallman*, 14 Me., 400; *Hotchkiss* v. *Hunt*, 49 Me., 213.
>
> "Sometimes the facts of the case may take it out of this rule; but we discover nothing in this case which should do so. Here the contract particularly describes the wood that was to be delivered under it; the kind of wood; its length; that it should be generally cleft, sound, and merchantable, containing no logs unsplit larger than seven inches in diameter, and no sticks larger than seven by eight inches; no small wood less than three inches in diameter when peeled. It was to be well peeled, knotted, cleaned, and fitted for the chipper, and to be well piled. A deduction was to be made in the survey for wood cut short, and for decayed, crooked and small wood. It was to be surveyed by some competent surveyor, when so delivered, to be appointed and paid by said

company. And the company was to pay for it, 'when said wood shall be delivered and surveyed as aforesaid.'

"From the language of the contract, we think it must be held that the parties contemplated that these acts should be done, and the wood paid for before the title passed to the purchaser. It was to be surveyed according to the terms of the contract by a competent surveyor. The quantity could be ascertained only by measurement. But a mere survey by measurement would not comply with the terms of the contract. The duty of the surveyor would require him to carefully inspect the wood, and determine whether it complied with the terms of the contract in kind, quality and dimensions, and to determine what deduction should be made if any portion of it was found not to comply with the terms of the contract. *Berry* v. *Reed*, 53 Me., 487. And the payment by the purchaser was to be concurrent with the survey and delivery. None of these conditions had been complied with, nor had they been waived by either party."

Here there was no express agreement in the contract, as there was in the case at bar, that the buyer should accept the wood after inspection thereof as provided in the contract. But the Court held that from the language of the contract, giving the buyer the right to inspect the wood after its delivery to him, to determine if it complied with the terms of the contract in kind, quality and dimensions, it was to be presumed that acceptance by the buyer and the passing of title was not intended by the parties to occur until after such inspection.

Potter v. *Holmes*, 92 N. W. Rep. (Minn.), 411:

the terms of which the vendors agreed to sell and

The parties entered into a written contract, by

deliver to the vendees railroad cross-ties of certain particular kinds and dimensions. The said ties were to be delivered on the line of the Northern Pacific Railroad Company. The provision of the contract regarding payment was as follows: "The parties of the first part agree to pay for all said ties that have been inspected and accepted by the Northern Pacific Railroad Company, except in cases hereinafter specified, as follows: 75 per cent. thereof within thirty days after each inspection, and the remaining twenty-five per cent. within thirty days after completion of this contract; but said twenty-five per cent. shall not be paid until the said second party shall have fulfilled and carried out their part of this contract." There was a provision in the contract that until the ties to be delivered thereunder should be inspected and accepted by the Northern Pacific Railroad Company the vendors should assume all risk of loss or damage thereto from any cause, including that by fire communicated by the engines or cars of the railroad company. Pursuant to this contract the vendors delivered ties along the Northern Pacific Railroad Company's line until they were requested by the vendees to cease operations. A few ties were inspected and accepted by the railroad company. The action was brought to recover the purchase price of the ties which had been delivered along the line of the railroad. At the close of the plaintiff's case the Trial Court dismissed the action upon the ground that at the time of the commencement of the action the title to the ties had not passed to the defendants; that the plaintiff had mistaken their remedy, and that the action should have been for damages for breach of an executory contract. The

question on appeal was whether or not the title had vested in the defendants prior to the commencement of the action. While the Court held that the title had passed to the defendants, it based its decision upon the ground that plaintiffs had made due demand upon defendants for inspection of the ties, which was refused. Upon the general question of when title was to pass under the contract, the Court said:

> "The agreement was an executory contract, but from the conditions and provisions comprising it, we are of the opinion that it was the intent of the parties to vest the title to the ties in respondents *at the time they should be inspected and accepted by the railroad company.* In order to vest such title in respondents, it was necessary for appellants to perform every act required of them in the way of delivery, grading, piling, and marking the ties; and if, in the process of inspection, it became necessary to rehandle them, they were required to perform such services, and until all of such acts had been performed, if required, they were in no position to claim that the title had passed from them."

Cefalu v. *Fitzsimmons*, 67 N. W. Rep. (Minn.), 1018:

The defendant, a dealer in fruit at Duluth, ordered from the plaintiffs, wholesalers at New Orleans, a car of bananas, to be shipped to St. Paul, in care of the Duluth Railway Company. They were so shipped and received by the Duluth Railway Company and carried to Duluth, where they were for the first time inspected by the defendant and found not to be as ordered. Thereupon the defendant wired the plaintiffs as follows: "Car of bananas here subject to your order; not a first-

class banana in the car"; and received in reply the following telegram: "Take fruit; will write." The defendant then took and disposed of the fruit, accounting to the plaintiffs for the proceeds thereof. The plaintiffs sued to recover the difference between what the defendant accounted for and the invoice price. The Court held that while under the contract the plaintiffs were to deliver the fruit at St. Paul, and that was the place of inspection and acceptance or rejection by the buyer, nevertheless the plaintiffs by their subsequent conduct waived inspection and acceptance or rejection at that point and consented to the inspection and acceptance or rejection of the fruit at Duluth; that title, therefore, did not pass to the defendant upon delivery at St. Paul as it would have done in the absence of such waiver and consent, and did not pass to the defendant at Duluth because the fruit was there rejected upon inspection. The Court said:

> "The principal controversy is over the question of the place of delivery and acceptance, and the subsequent conduct of the parties in relation to the bananas. It is doubtless the true rule of law that, on a sale of goods, *the place of delivery is the place of inspection and acceptance or rejection, but the rule can be waived by the acts or agreement of the parties* When the plaintiffs were notified by defendant that there was not a first-class bunch of bananas in the car, and that they were in Duluth subject to plaintiffs' order, the plaintiffs might legally have insisted upon the acceptance or rejection of the fruit at St. Paul, the place of delivery; but, instead of so doing, they wired defendant to 'Take fruit; will write.' The fair inference to be drawn from such a telegraphic communication is that plaintiffs wished the

> defendant to take the fruit at all events. Defendant, instead of accepting or rejecting the fruit at St. Paul, chose to reject it, as not being in accordance with the conditions of purchase. Where was defendant to take it then? The answer is, at Duluth. The fruit was there; the defendant was there; and there is where the telegram was sent, to take it. Therefore sufficient appears to show that plaintiffs waived its acceptance or rejection at St. Paul. And the fair inference from defendant's telegram to plaintiffs, that the fruit was at Duluth, subject to their order, is that it rejected or refused to accept it."

As the plaintiffs could, subsequent to the execution of the contract and the shipment of the fruit, consent to the inspection and acceptance or rejection of the fruit at Duluth so that the title to the fruit would not pass to the defendant until accepted at that point, so it could have contracted in the first instance that although the fruit was to be delivered to the defendant at St. Paul, the inspection and acceptance upon which the title was to pass should take place at Duluth. In the case at bar the parties expressly agreed that while the hay was to be delivered to the Railroad Company at Buffalo, the inspection and acceptance should take place at the Railroad Company's mines. We submit that the title to the hay did not pass to the Railroad Company upon delivery at Buffalo and prior to inspection and acceptance at the mines, any more than it passed to the defendant in the above case upon delivery at St. Paul.

Grimoldby v. *Wells*, L. R., 10, C. P. 391:

Tares were sold and delivery was made to the buyer half way between the houses of the buyer and seller. The buyer carted the tares to his

barn where he inspected them and thereupon rejected them. The Court held that the title did not pass to the buyer, saying:

> "There is here a contract for the sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises; for it cannot properly be said that it would be reasonable to hold the defendant bound to examine them when they were delivered to him at half way of the journey. * * * When there is a sale by sample, and the time for inspection is subsequent to delivery, and the place of inspection different from that of delivery, then if the goods are found on such inspection not to be equal to sample, the purchaser has a right to reject them then and there, and it is the duty of the vendor to get them back thence."

Perkins v. *Bell*, 1 Q. B., 193, 62 L. J., Q. B., 91: The plaintiff, a farmer, sold to the defendant, a corn-dealer, barley by sample, deliverable at Theldingworth railway station near the plaintiff's farm. The plaintiff knew that the barley was bought for resale, but did not know when or to whom the resales would take place. The same day the defendant resold the barley by the same sample to a brewing company. The barley was duly delivered at the station, and a sample of the bulk was sent by the station-master to the defendant at his request. Having inspected this sample, the defendant told the station-master to send on the barley to the brewers. They rejected the barley as not being equal to the original sample, which was the only sample shown to them, and the defendant then claimed to be entitled to reject it. The plaintiff sued him for goods sold and delivered.

The Court held there was nothing to displace the original presumption that Theddingworth station was the place of inspection. The Court said:

> "The plaintiff knew of no other destination for the goods, and to hold that he consented that any other place than that of delivery should be the place of inspection would, by virtue of the property remaining in him, be to cast upon the seller the risk of loss or damage to the goods during their transit to an unknown sub-buyer, and (if the sub-buyer rejected them) back again, and such consent could not in consequence be presumed. When, therefore, the buyer, having had a reasonable opportunity of inspecting the barley at Theddingworth station, there took possession of it, and ordered it to be sent on to the sub-buyers, he accepted it; the property in the barley passed to him, and his right of rejection was then gone."

The Court held that the property in the barley passed to the buyer at Theddingworth station because under the circumstances it was to be presumed that the parties intended that the barley should be inspected and accepted by the buyer at that point. But the Court in its opinion intimated that this presumption might have been overcome by an express agreement of the parties. The case is analogous to what the case at bar might have been if there had been no express agreement by the parties that the inspection and acceptance of the hay should take place at the mines. If there had been in the above case such an express agreement as there was in the case at bar, for the inspection and acceptance of the barley at a later time and different place than that of delivery at Theddingworth station, it seems clear

from the Court's opinion that the title would have been held not to have passed until the buyer inspected and accepted the barley in accordance with the agreement.

All the cases above cited illustrate the principles of law hereinbefore stated, which, as we have endeavored to show, determine the question when the title to the hay passed to the Railroad Company in the case at bar. In all of them it appears that the seller was required to deliver the property to the buyer and therefore the title to the property presumably did not pass to the buyer until such delivery and an acceptance by the buyer; that where the parties had agreed, or in the absence of an express agreement where it was to be presumed from the circumstances of the case that the parties intended, that the acceptance of the property should take place after inspection at a time later or a place different than that of delivery, the title did not pass until such inspection and acceptance (unless waived) occurred.

Upon principle as well as upon the authority of these cases, we submit, the title to the hay did not pass to the Railroad Company until it accepted the hay after inspection at the mines.

SECOND POINT.

Assuming that the Railroad Company owned the hay in question during the transportation thereof over its railroad from Black Rock to Scranton, the Commodities Clause, in its application to such transportation, was unconstitutional because it deprived the Railroad Company of its liberty and property without due process of law, in violation of the Fifth Amendment to the Constitution.

I.

The question here presented has not been passed upon by this Court.

In the so-called Commodities Cases (*United States* v. *Delaware & Hudson Company, and other cases decided at the same time*, 213 U. S., 366), the Government sought by injunction and writ of mandamus to prevent each of the defendant railroad companies from transporting from the mines in Pennsylvania to other States, anthracite coal, mined or produced by it, or owned by it during such transportation, or in which it had during such transportation an interest, direct or indirect, through stock ownership in other companies mining and owning the coal. Said railroad companies were transporting such coal from the mines to various markets in other States, there to be sold by them or by their subsidiary or affiliated companies, in competition with the coal of other producers and owners, which the latter were obliged to ship to such markets over the railroads of said railroad companies. It was such transportation by said railroad companies of their own coal to market, that the Commodities Clause was invoked in those

cases to prevent. The cases were submitted and argued upon petitions, bills and answers; and the facts set forth and the arguments made for and against the constitutionality of the Clause, all had reference to its constitutionality as applied to that particular kind of transportation.

This Court, in the light of the question thus presented and argued, having first construed the Clause to forbid a railroad company from transporting in interstate commerce a commodity which it owned or in which it had a legal interest during the transportation thereof, but not to forbid it from transporting a commodity which it had manufactured, mined or produced, but divested itself of all ownership or legal interest in, before transportation, held the Clause, as so construed, constitutional. And the Court said in its opinion:

> "Through abundance of caution we repeat that our ruling here made is confined to the question before us."

In the case at bar, the facts are quite different. The plaintiff-in-error is charged with violations of the Commodities Clause because it transported in interstate commerce over its railroad to mines lawfully owned and operated by it, hay which it had lawfully purchased, and which was intended for use, and was in fact lawfully used, by it in the operation of said mines. We purpose to show that such transportation is entirely free from the evil inherent in the transportation by a railroad company of its own commodities to market, and from any evil which might justify under the Constitution the absolute prohibition of such transportation by the Commodities Clause.

The same statute may be constitutional in its

application to one set of facts and unconstitutional in its application to a different set of facts.

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the plaintiff-in-error. In so deciding we do not at all mean to hold that under no circumstances could a judgment enforcing track connections between two railroad corporations be a violation of the constitutional rights of one or the other, or possibly of both such corporations. It would depend upon the facts surrounding the cases in regard to which the judgment was given. The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling, factor upon the question of its validity. A statute, or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse, of legislative action." (*Wisconsin, M. & P. R. R. Co.* v. *Jacobson,* 179 U. S., 287.)

> "The validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose." (*Chicago, etc., R. R. Co.* v. *Drainage Commissioners,* 200 U. S., 561.)

II.

The power to regulate commerce among the States is limited by the Fifth Amendment.

Full and complete as the legislative power to regulate commerce among the States has been declared by this Court to be, it is nevertheless firmly established that such power is subject to the limitations of the Fifth Amendment.

> "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, *and acknowledges no limitations other than are prescribed by the Constitution.*" (*Gibbons* v. *Ogden*, 22 U. S., 1.)

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment." (*Monongahela Nav. Co.* v. *United States*, 148 U. S., 336.)

> "Both the Fifth and the Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution." (*McCray* v. *United States*, 195 U. S., 27.)

> "We need scarcely repeat what this Court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental rights secured by other provisions of the Constitution." (*Adair* v. *United States*, 208 U. S., 161.)

III.

The limitations imposed by the Fifth Amendment upon the exercise by Congress of the power to regulate commerce are the same as those imposed by the Fourteenth Amendment upon the exercise of the police power by the State Legislatures.

The power to regulate commerce originally resided in its entirety in the States. The Constitution transferred a part of that power, to wit, the power to regulate *interstate* commerce from the States to the Federal Government. As said by Mr. Justice Johnson in the case of Gibbons *v.* Ogden: "The power to regulate commerce here meant to be granted, was that power to regulate commerce which previously existed in the States. But what was that power? The States were unquestionably supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign State."

The power of the States to regulate commerce is and always has been a police power, inherent in sovereignty. The federal power to regulate *interstate* commerce, taken as it was originally from the States and committed to the nation, remains in its nature and scope a police power, not inherent in sovereignty it is true because the Federal Government is one of enumerated and delegated powers, but resting upon the express grant of that power to Congress in the Constitution. (*Freund Police Power*, Secs. 65, 66.)

Within their proper sphere the States are as sovereign as is the Federal Government. Congress in the exercise of its power to regulate commerce is no more superior to the Federal Constitution than are State Legislatures in the exercise of the police power superior to that instrument.

In Twining *v.* State, 211 U. S., 78, 101, the Court declared with respect to the due process provisions of the Fifth Amendment and of the Fourteenth Amendment, that if any different meaning of the words could be conceived "none has yet appeared in judicial decisions."

It must follow, therefore, that the limitations imposed by the Fifth Amendment upon the exercise by Congress of the power to regulate commerce, are the same as the limitations imposed by the Fourteenth Amendment upon the exercise of the police power by the States. And it also follows that the same principles control the Courts in determining whether congressional legislation violates the Fifth Amendment as control in determining whether State legislation violates the Fourteenth Amendment.

> "While we need not affirm that in no instance could a distinction be taken, ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a State law in like terms was void under the Fourteenth. It is true that by the provision in the body of the instrument Congress has power to regulate commerce, and that the act of Congress referred to in the cases cited (the Anti-Trust Act of 1890), was passed in pursuance of that power. But even if the Fifth Amendment were read as contemporaneous with the original Constitution, the power given in the commerce clause would not be taken to override it so far as the Fifth Amendment protects fundamental personal rights." (*Carroll* v. *Greenwich Ins. Co.*, 199 U. S., 401, 410.)

IV.

The Fifth Amendment forbids Congress, in the exercise of the power to regulate commerce, to arbitrarily, unreasonably or unnecessarily interfere with individual rights of liberty and property. That statute is an arbitrary, unreasonable and unnecessary interference with such rights, which has no reasonable relation to the accomplishment of any legitimate public object.

It is the right and duty of the Courts to determine whether or not a statute of Congress exceeds authorized regulation, and arbitrarily unreasonably or unnecessarily interferes with rights of liberty and property. The question is frequently one of degree depending upon the circumstances of the particular case, the subject matter, the end sought to be attained and the relation of the means to that end. These propositions are clearly established by the decisions of this Court.

In the case of the *Union Bridge Co.* v. *United States*, 204 U. S., 364, in which was considered the validity under the Fifth Amendment of an exercise of the federal power to regulate commerce, they were stated in the following words:

> "If the means employed have no real, substantial relation to public objects which the Government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms, and interfere for the protection of rights injuriously affected by such illegal action. The authority of the Courts to interfere in such cases is beyond all doubt."

In numerous cases, relating to the validity under the Fourteenth Amendment of State legislation passed in the exercise of the police power, and which as we have shown do not differ in prin-

ciple from cases involving the validity under the Fifth Amendment of Congressional legislation passed in the exercise of the power to regulate commerce, similar propositions have been declared, as follows:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts" (*Lawton* v. *Steele*, 152 U. S., 132).

> "In every case that comes before this Court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? * * * The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and

the end itself must be appropriate and legitimate, before an act can be held to be valid which interfers with the general right of an individual to be free in his person and in his power to contract in relation to his own labor" (*Lochner* v. *New York*, 198 U. S., 45).

"Constitutional rights like others are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain" (*Martin* v. *District of Columbia*, 205 U. S., 135, 139).

"As the public power to regulate railways and the private right to ownership of such property co-exist and do not the one destroy the other, it has been settled that the right of ownership of railway property like other property rights finds protection in constitutional guarantees, and therefore, wherever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment" (*Atl. Coast Line Co.* v. *North Carolina Commission*, 206 U. S., 1, 20).

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached" (*Hudson County Water Co.* v. *McCarter*, 209 U. S., 349).

V.

The Commodities Clause, in its application to the facts of this case, deprived the Railroad Company of its liberty and property.

In Allgeyer *v.* Louisiana, 165 U. S., 589, it was said:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The railroad company has the legal right to purchase in Buffalo or any other place, hay or any other commodity for the operation of its mines. It has the legal right to use such commodities in the operation of its mines. Its collieries, with one exception, are reached only by its own railroad (Record, p. 32). To deprive it of the only practicable means of conveying its lawful commodities from any point outside the State of Pennsylvania to its mines, is to deprive it of its liberty and property in respect to the use and enjoyment of such commodities. To forbid it to use its railroad for the transportation of such commodities to its mines, is to deprive it of its liberty and property in respect to the use and enjoyment of said railroad..

VI.

The Commodities Clause, in its application to the facts of this case, is arbitrary, unreasonable and unnecessary, in that it has no reasonable relation to the accomplishment of any legitimate public object.

It may be helpful in coming to an understanding of the purpose of the Commodities Clause to first refer briefly to the decisions, and the proceedings in Congress, that led up to the enactment of the Clause.

In 1890 and 1891 the Interstate Commerce Commission decided the cases of Haddock *v.* D. L. & W. R. R. Co., 4 I. C. C. R., 296, and Coxe *v.* Lehigh Valley R. R. Co., 4 I. C. C. R., 535. In these cases the Commission considered the application of the unjust discrimination provisions of the Interstate Commerce Act to the transportation by railroad companies of anthracite coal which they produced, mined and marketed. It was charged that the railroad companies by selling their coal at a price insufficient to pay the cost of production, the cost of delivery and the published freight charges to destination, brought about the transportation of their own coal at less than the published freight rates, in violation of the Interstate Commerce Act. The Commission recognized and stated that such transportation, by reason of the dual capacity of the railroad companies acting both as shippers and carriers, was peculiarly subject to discriminations in the matter of freight charges. But it held that it was unable to prevent such discriminations; in the first place, because it was impossible to ascertain with any accuracy to what extent, if any, they existed, on account of the interblending of the accounts of the two kinds of business; in the second

place and primarily, because in view of the lawful powers of the railroad companies, derived from State charters and statutes existing before the passage of the Interstate Commerce Act, to mine, sell and transport their own coal, the Commission had under that Act no authority or power in the premises beyond compelling the exaction of just and reasonable rates.

In February, 1906, this Court decided the case of the N. Y., N. H. & H. R. R. Co. *v.* Interstate Commerce Commission, 200 U. S., 361. In that case it appeared that the Chesapeake & Ohio Railroad Company had transported over its road coal which it had purchased at a point on its line and sold delivered in New England at a price insufficient to pay the cost of purchase, the cost of delivery and the published freight charges to the place of delivery. The Court held that the railroad company by transporting coal, purchased and sold by it on such terms, violated the provisions of the Interstate Commerce Act requiring uniformity of rates and prohibiting rebates, since the obvious result of the whole transaction was to bring about the transportation of the coal at less than the published freight rates. The Court refused to accept the rulings of the Interstate Commerce Commission in the Haddock and Coxe cases as controlling in the case before it, because the Chesapeake & Ohio was neither by its charter nor by legislative grant existing at the time of the adoption of the Act to Regulate Commerce, possessed of the commingled attributes of carrier and producer, as were the railroad companies in the Haddock and Coxe cases. But the Court did say that the interpretation given by the Commission in those cases to the Act to

Regulate Commerce, was binding, and as restricted to the precise conditions passed upon in those cases, must be applied to all strictly identical cases in the future, at least until Congress had legislated on the subject.

Upon the decision in the New Haven case, therefore, the law stood as follows: The transportation by a railroad company of a commodity which it produced, mined or purchased, and sold, was subject to a peculiar form of discrimination in the matter of rates. Such discrimination was prohibited by the Act to Regulate Commerce in the case of commodities purchased and sold by a railroad company. It was not prohibited by said Act in the case of commodities produced and sold by a railroad company under express legislative authority existing at the time of the adoption of said Act.

The New Haven case undoubtedly pointed the way to Congress in the enactment of the Commodities Clause. It was referred to by Senator Elkins at the time he offered the first amendment on the subject, and it was discussed several times in the course of the debates thereon. (*Cong. Rec., Vol.* 40, *pp.* 6618, 6685, 6686, 6693, 6757 and 6758.)

The Commodities Clause resulted from an amendment proposed for the first time on the floor of the Senate, after the Hepburn Bill had passed the House and had been reported by the Senate Committee, and was considered only on the floor of the two Houses and in Conference Committee. On May 7th, 1906, while the Hepburn Bill was before the Senate, Senator Elkins offered an amendment in the following words:

> "It shall be unlawful for any common carrier subject to the provisions of this Act, unless authorized by its charter to do so, to engage, directly or indirectly, in the production, manufacture, buying, furnishing or selling of coal, coke or any other commodity or commodities of commerce in competition with any shipper or producer on its line or lines, providing that nothing in this Act shall be construed to prevent the carrier from mining coal exclusively for its own use." (*Cong. Rec., Vol. 40, p. 6618.*)

This amendment immediately aroused opposition on the part of Senators who objected to such a radical and sweeping provision, either on the ground of policy or on constitutional grounds. They proposed to meet the evil under consideration by prohibiting railroad companies from carrying their own products to market in competition with other shippers. In the course of the debate following the offering of Senator Elkins' amendment and on the same day, Senator Daniel said:

> "It is my desire that when an amendment is put in the bill on this subject it shall be an effective one, and the end I would subserve would be this, to prevent those railroads which are engaged also in mining from carrying their own product to market in competition with the shippers who have to pay to get to market. * * * What is sought to be aimed at is the transportation of articles produced by a common carrier in interstate commerce in competition with articles which are bought by shippers or are delivered to the railroads for carriage by customers. How can Congress avail that purpose by attempt-

ing to deny the right of a carrier which is engaged in a lawful occupation, under the Charter of a State, from engaging in interstate commerce at all? It seems to me the amendment takes hold of the subject by the wrong handle and puts its interdict on the wrong thing. It is the transportation of such things in interstate commerce, not engaging in interstate commerce at all, to which it seems to me the aim of Congress should be directed. If the amendment would say in so many words that no carrier shall transport in interstate commerce articles of which it is itself the producer or the manufacturer ,that would reach it, if Congress can reach it." (*Cong. Rec., Vol.* 40, *p.* 6620.)

And following these remarks, Senator Danial offered as a substitute for the pending amendment, the following amendment, which he declared would in his opinion "reach the matter":

> "It shall be unlawful for any common carrier to transport from one State, Territory or district of the United States to another State, Territory or district of the United States or to any foreign country any article or commodity whatever which may be owned by it or in which it has any interest, excepting such as are necessary for its own use in its business as a carrier and not intended for sale, barter, or commercial traffic of any sort." (*Cong. Rec., Vol.* 40, *p.* 6623.)

It will be observed that this amendment is substantially the same as that which was finally enacted by Congress.

Other amendments were offered on the same day to carry out the thought expressed by Senator Daniel. Senator McLaurin suggested an amendment to the amendment offered by Senator Elkins, saying:

"The amendment prohibits those engaged in the mining or production of coal or coke or other commodities from engaging in interstate commerce of any kind. I think the amendment would be unobjectionable if after the words 'interstate commerce' it added 'as a common carrier of articles and commodities of its own production, mining or manufacture.' I do not think that because a railroad company is engaged in the mining of coal it should be prohibited from engaging in any kind of interstate commerce as a common carrier or in hauling the United States mail. I do not think the mere fact that a common carrier is engaged in the mining of coal should preclude that common carrier from carrying flour, or meal, or meat, or wheat, or any other commodity except the one in the production of which it is engaged." (*Cong. Rec., Vol.* 40, *p.* 6621.)

Senator McCumber offered an amendment, forbidding any common carrier under the provisions of the Act from engaging in marketing or selling any coal, coke or other commodity entering into interstate commerce, in support of which he said:

"What the Senator, I presume, really wants to secure, and what we all wish to secure, is an amendment that will prohibit railway companies as much as possible from engaging in interstate commerce in articles of their own production. That may be obtained, it seems to me by a very few words, much less than are contained in the amendment offered by the Senator from Mississippi (McLaurin) to the amendment." (*Cong. Rec., Vol.* 40, *p.* 6680.)

In the consideration of the subject the Senate divided into two groups, one advocating the substance of the amendment offered by Senator Elkins

and the other advocating the substance of the amendment offered by Senator Daniel. It was contended on the one hand that interstate carriers ought to be prohibited from engaging at all in the business of production, mining or manufacturing, and to that end such an amendment as that offered by Senator Elkins ought to be adopted. It was contended on the other hand that such an amendment would work grave injustice and be of doubtful constitutionality, and that the evil to be remedied would be fully met by an amendment prohibiting carriers from transporting in interstate commerce their products to market. The debates will be found in the Congressional Record, Vol. 40, pp. 6618-6761.

Upon the conclusion of the debates, Senator Elkins accepted as a substitute for the amendment offered by him, an amendment *embodying the substance of the amendment, hereinbefore quoted, offered by Senator Daniel;* and this substitute amendment was adopted, and became the Commodities Clause.

From the foregoing it seems clear that Congress in enacting the Commodities Clause legislated with reference to that transportation which was considered in the Haddock, Coxe and New Haven cases, namely, the transportation by a railroad company to market of commodities produced, mined, manufactured, purchased or otherwise acquired, and sold by it in competition with others. And it further seems reasonable to say that the evil in that transportation which led Congress to prohibit absolutely the transportation itself, was the discrimination to which the transportation was peculiarly subject as pointed out

by the Commission and the Court in those cases. Let us consider more fully the nature of that discrimination.

It appeared in the Haddock, Coxe and New Haven cases that a railroad company which mined or purchased, transported to market and sold any commodity, coal for instance, might, as the Chesapeake and Ohio in the New Haven case actually did, sell it delivered at a price insufficient to pay the cost to it of the coal and the full tariff charges for its transportation to market. By thus transporting the coal for less than the tariff rate, the railroad company rebated directly and immediately in favor of the buyer of the coal. He paid the freight charges and enjoyed the benefit of the reduction therein. And by means of such rebating, if pushed to its logical extreme, the railroad company was enabled to create either in itself or in favored sellers and buyers a monopoly of all commodities along its line in which it chose to deal. To quote from the opinion in the New Haven case:

> "Now, if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier

chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly."

Such was the discrimination, we believe, which it was the purpose of Congress in enacting the commodities clause to stamp out—a form of discrimination far reaching in its harmful results; difficult in any case and impossible in many to search out and punish because of the ability of a railroad company to cover up and conceal the facts in the commingled accounts of the two kinds of business, commercial and transportation; and entirely unprohibited at the time of the enactment of the Commodities Clause in the case of commodities mined or produced by railroad companies under express legislative authority existing at the adoption of the Interstate Commerce Act, by reason of the Commission's construction of that Act in the Haddock and Coxe cases.

In the Commodities Cases (*United States* v. *Delaware and Hudson Company, supra*), the Supreme Court considered the constitutionality of the Commodities Clause in its application to the kind of transportation which is peculiarly subject to such discrimination—the transportation by a railroad company of its commodities to market for sale. And it would appear from the Court's opinion that it was such discrimination, or rather the special temptations and opportuni-

ties therefor, inherent in such transportation, that persuaded the Court to uphold the constitutionality of the Commodities Clause in those cases, for the Court rested its decision as to the constitutionality of the Clause upon the authority of the New Haven case, in which such transportation and such discrimination alone were considered. The Court said:

> "The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent, *and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, New Haven and Hartford Railroad Company case, to which we have previously referred.*"

In the case at bar, however, the transportation to which the Commodities Clause has been applied, is the transportation by the Railroad Company of hay, lawfully purchased and owned by it, to mines lawfully owned and operated by it, *not for sale*, but for use in the operation of those mines. The kind of discrimination which we have been considering is entirely absent from such transportation. It can not exist in connection therewith, because the Railroad Company does not deal commercially in hay or other commodities so transported.

But it may be said, there are other evils inherent in the transportation by a railroad company of its own commodities, whether they are sold or used in the operation of its mines, which justify under the Constitution the absolute prohibition of the transportation subject to them. What are those evils?

It may be suggested that the clause was aimed at discrimination in the matter of service and facilities, which a railroad company is under special temptation to accord its own shipments. But such discriminations must always arise out of overt acts; and they have been effectually prohibited by the unjust discrimination provisions of the Interstate Commerce Act since the passage of that Act. They are and always have been as easily discoverable and as effectually prohibited in the case of railroad shipments as in the case of any other shipments. Moreover, the temptation and opportunity to discriminate in the matter of service and facilities in favor of a railroad company's own shipments can certainly be no greater than in the case of certain other kinds of traffic, for example, traffic originating at a highly competitive point, or traffic of a large shipper controlling the routing of the bulk of the traffic in his particular line. It can hardly be said that Congress might, in the exercise of the power to regulate commerce absolutely prohibit a railroad company from carrying such traffic because of the temptations and opportunities to discriminate, inherent therein. On what theory, then, can it be said that Congress may constitutionally prohibit a railroad company from carrying its own shipments, because of the same sort of temptations and opportunities to discriminate in favor thereof in the matter of service and facilities.

Again it may be suggested that a railroad company which transports its own property, enjoys an advantage over its competitors, in that it obtains the transportation service at cost, while its competitors pay for such service the tariff rate which presumably includes a profit to the rail-

road company. But that advantage, if it may be called such, simply represents the profit it obtains out of its tariff rate for performing a transportation service. As a carrier, the railroad company is entitled to the profit included in its tariff rate for transporting its own property as well as for transporting the property of other shippers; and it is to be assumed that it takes that profit to itself as carrier and in that capacity retains it, just as it is to be assumed that it takes to itself and retains as carrier the profit it makes from transporting any and all shipments of all other shippers. If it be said that the railroad company enjoys the benefit of the profits it makes from carrying its own property, in whatever capacity it acts, and may use those profits in its capacity of dealer to undersell its competitors, it may with like reason be said that it so enjoys and may use in the same way the profits it makes from carrying all other shipments. The profits it makes from its entire transportation business strengthen it financially, and may thereby enable it more successfully to conduct its commercial business. But those profits, whether they arise from the transportation of its own property or the property of others, cannot be said to be an evil inherent in such transportation which would justify Congress under the Constitution in prohibiting all such transportation. Surely a railroad company could not be prohibited from carrying hay for its competitors because it might use the profits obtained therefrom in its lawful commercial business to the disadvantage of its competitors. No more, we submit, can it be prohibited on that ground from carrying hay for itself.

It seems to us, therefore, in view of the foregoing considerations, and in view of the decisions in the Haddock, Coxe and New Haven cases, and the history of the enactment of the Commodities Clause, that it may reasonably be said that the purpose of Congress in enacting the Commodities Clause was to stamp out the discrimination in the matter of rates which the Commission and this Court had condemned in those cases; and, moreover, that whatever may have been the purpose of Congress, that discrimination was the only evil inherent in the transportation by a railroad company of its own commodities, which could justify the prohibition of such transportation under the Constitution.

But there is another consideration present in the case at bar, which was not present in the Commodities Cases, and which appears to us to be conclusive against the constitutionality of the Commodities Clause in its application to the facts of this case. And that is that it cannot under any circumstances make the slightest difference from the standpoint of the public or of any shipper or of the Railroad Company's competitors in the coal business, whether the Railroad Company is or is not permitted to transport its own commodities over its own railroad, for use in its mines. This we think can be demonstrated.

It is mathematically certain that the price of any commodity purchased by the Railroad Company at the mines will exceed the price of that commodity purchased at any point on the Railroad Company's line, exactly by the amount of the freight charges from that point to the mines. Such, moreover, has

been the experience of the Railroad Company's purchasing department (*Record, p. 32*).

Now the Railroad Company may lawfully purchase for use in its mines, any commodity which has already been transported over its road and unloaded at or near the mines. Or it may lawfully agree to purchase any commodity under a contract requiring the seller to ship it over the Railroad Company's road and deliver it at the mines, and providing that the title shall not pass until the commodity is accepted by the Railroad Company at the mines. In neither case will the Railroad Company own the commodity during the transportation thereof, or have any legal interest, direct or indirect, therein.

It is apparent that the result in dollars and cents to the Railroad Company will be exactly the same whether it purchases the commodity in the manner above stated, or whether it purchases and takes title to the commodity at a point like Buffalo on its line. In the one case it pays the seller the Buffalo price, plus the freight charges from Buffalo to the mines, and receives back those freight charges for carrying the commodity. In the other case it pays the seller the Buffalo price and transports the commodity from Buffalo to the mines at its own expense.

And so in respect to possible discriminations in the matter of service and facilities. The possibility of such discriminations in connection with the transportation by a railroad company of its own property to its mines, is remote in any event. The occasions on which it would stand to profit thereby are few; and the occasions are fewer on which it would be tempted in the face of the prohibitions of the Interstate Commerce Act to indulge therein.

They might well be dismissed from consideration in this case as *de minimis*. But certainly the temptations and opportunities for such discrimination can be no greater in the case of a commodity which the Railroad Company has become the owner of, than in the case of a commodity which it contemplates becoming the owner of.

How, then, can the public or any individual shipper or any competitor of the Railroad Company in the coal business have any possible interest in whether the Railroad Company does or does not transport its own commodities to its mines over its own railroad? The result to them from every point of view will be exactly the same in either case.

Because, therefore, the transportation by a railroad company of its own commodities to its mines for use in the operation thereof, is free from any evil that might justify the absolute prohibition of such transportation in the public interest, and because it must in the very nature of the case be a matter of complete indifference to the public, and every individual shipper, and every competitor of the Railroad Company in the coal business whether or not the Railroad Company does or does not engage in such transportation, so long as it continues lawfully to own and operate its mines, we submit in conclusion that the Commodities Clause in prohibiting such transportation has no reasonable relation to the accomplishment of any legitimate public object, that it is arbitrary, unreasonable and unnecessary and violates the Fifth Amendment to the Constitution of the United States.

THIRD POINT.

The judgment of the Court below should be reversed and the case remanded with directions to dismiss the indictment.

September 23rd, 1913.

Respectfully submitted,

W. S. JENNEY,

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